



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT MOMBASA  
 CAUSE NUMBER 236 OF 2013

**BETWEEN**

- 1. IGNAS KARINGO MGHONA
- 2. MATHIAS OTONYO SESE
- 3. MIRIAM CHENYE
- 4. ROSELINE MGHOI KILIO
- 5. JENNIFER MBINYA JULIUS..... CLAIMANTS

**VERSUS**

STAR OF HOPE INTERNATIONAL FOUNDATION .....RESPONDENT

*Rika J*

Court Assistant: Benjamin Kombe

*Ms.Kedeki Advocate instructed by Kedeki & Company Advocates for the Claimants*

*Mr. Odhiambo Advocate instructed by Odhiambo S.E. & Company Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The 5 Claimants filed their joint Statement of Claim, on the 30<sup>th</sup> July 2013. They state they were employed by the Respondent, on various dates, in diverse capacities. 1<sup>st</sup> Claimant [ Mghona] was appointed on 24<sup>th</sup> June 2009 as a Carpenter/ Fitter, on a renewable contract of 6 months; 2<sup>nd</sup> Claimant [Sese] joined the Respondent in the position of a Guard on 1<sup>st</sup> January 2004; 3<sup>rd</sup> Claimant [Chenye] joined on 24<sup>th</sup> June 2004 as a Book-keeper; 4<sup>th</sup> Claimant [Kilio] joined the Respondent in the position of

a Nursery School Teacher on 8<sup>th</sup> January 1990; while the 5<sup>th</sup> Claimant [Mbinya] was employed on the 2<sup>nd</sup> June 2009, as a Pre- School Teacher. Around January 2011, they were sacked by the Respondent after boycotting work, demanding for salary increments. They were reinstated following the intervention of the political leadership in Mombasa. They continued to work in very hostile environment, without the salary increments. The Respondent terminated the Claimants' contracts of employment on or around 31<sup>st</sup> May 2012, citing redundancy. The Claimants hold the decision was unfair and unlawful and seek the following orders against the Respondent:-

A. IGNAS KARINGO

1. 1 month salary in lieu of notice at Kshs. 17,118.
2. Service pay of 4 years at Kshs. 34,236.
3. Underpayment of wages at Kshs. 364,248

Total .....Kshs. 415,602

B. MATHIAS SESE

1. 1 month salary in lieu of notice at Kshs. 8,463
2. Service pay of 9 years at Kshs. 38,084.
3. Underpayment of wages at Kshs. 52,662.

Total ..... Kshs. 99,210

C. MIRIAM CHENYE

1. 1 month salary in lieu of notice at Kshs. 11,684.
2. Service pay of 8 years at Kshs. 46,736.
3. Underpayment of wages at Kshs. 150,624.
4. Annual leave pay for 4 years at Kshs. 34,000.
5. Traveling allowance for June 2010 to May 2011 at Kshs. 12,000.

Total ..... Kshs. 255,044

D. ROSELINE MGHOI

1. 1 month salary in lieu of notice at Kshs. 11,684
2. Service pay of 22 years at Kshs. 128,524.
3. Underpayment of wages at Kshs. 161,040

Total..... Kshs. 301,248

E. JENNIFER MBINYA

1. 1 month salary in lieu of notice at Kshs. 11,684.
2. Service pay of 3 years at Kshs. 17,526.
3. Underpayment of wages at Kshs. 96,624

Total ..... Kshs. 125,834

The Claimants seek also, a declaration that termination was wrongful; they are given their Certificates of Service; they are paid damages; costs; interest; and any other suitable relief.

2. The Respondent filed its Statement of Response on the 9<sup>th</sup> September 2013. It agrees the Claimants were its Employees, in the positions shown in their Claim, but denies their assertion that they were

underpaid. They did not work in hostile environment. The Respondent declared redundancy, offered the Claimants their dues, which they declined. Redundancy followed the law. 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Claimants were employed as Book-keeper and Teachers, and were not covered by the Regulation of Wages and Conditions of Employment Act Cap 229, and its successor the Labour Institutions Act 2007. Traveling allowance claimed by the 3<sup>rd</sup> Claimant, was not part of her contract, and was not authorized by the Respondent's Board. The Respondent prays for dismissal of the Claim with costs to the Respondent.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Claimants testified on the 25<sup>th</sup> November 2014. The 3<sup>rd</sup> and 5<sup>th</sup> Claimants testified on the 26<sup>th</sup> May 2015, when the Claimants rested their case. The Respondent called its Director and Pastor who testified on the 21<sup>st</sup> October 2015 when the hearing closed.

## **CLAIMANTS' EVIDENCE**

### **1<sup>st</sup> Claimant, Mghona.**

4. He told the Court he was a Carpenter, with a National Trade Test Certificate Grade 1, in Carpentry and Joinery. He worked for the Respondent for 4 years, earning a monthly salary of Kshs. 5,500 per month. He should have been earning Kshs. 17,000 per month. The Claimants demanded for pay rise and were dismissed. They had been reinstated in 2011 with the assistance of the local political leadership. Mghona was offered Kshs. 20,113 on termination. He asks the Court to grant his prayers. On cross-examination the 1<sup>st</sup> Claimant told the Court he availed his Trade Certificate to the Respondent on employment. The Respondent is a Swedish International Non- Governmental Organization. Mghona did not know if the Respondent was fully reliant on donor funds. He did not produce documents demanding for wage review during employment. His correct salary was Kshs. 17,118 based on legal notice number 64 of 1<sup>st</sup> May 2012. Termination was on 31<sup>st</sup> May 2012. He was employed on 24<sup>th</sup> June 2009 and left on 31<sup>st</sup> May 2012. Initially he made a demand for Kshs. 115,755, as compared to his Claim in Court for Kshs. 415,602.

### **2<sup>nd</sup> Claimant, Sese**

5. Sese testified he was assigned additional duties. He was a Guard as well as a Gardener. The Employees joined the KUDHEIHA Trade Union. The Employer did not approve of this. Employees boycotted work to press for higher salaries. They were dismissed and later reinstated. Redundancy followed. All Shop-stewards were dismissed. Redundancy notice is dated 31<sup>st</sup> May 2012. They were required not to report to work, effective from 1<sup>st</sup> June 2012. The 2<sup>nd</sup> Claimant was earning Kshs. 7,000. He did not know how much he was supposed to be earning. KUDHEIHA did the computation of dues for the Employees. The 2<sup>nd</sup> Claimant testified on cross-examination that Living World Education Centre, in whose name his letter of appointment issued, is part of the same group with the Respondent. The Chairman of the Respondent signed the letter of appointment. The 2<sup>nd</sup> Claimant worked under the Living World Education Centre for 10 years. He has sued the Star of Hope. The 2<sup>nd</sup> Claimant was offered notice pay and service pay, on termination. He had a loan with the Respondent which was being offset from his salary. He did not have any letter addressed to the Respondent in the course of employment, in which he made a demand for underpayment of wages.

### **3<sup>rd</sup> Claimant, Chenye**

6. She last earned a salary of Kshs. 7,500 as a Book-keeper. She was notified of redundancy on 31<sup>st</sup> May 2012, which became effective the following day, 1<sup>st</sup> June 2012. She did not accept the terminal benefits offered by the Respondent. The sum offered was less than expected. She was discharging the accounting role, which was still there at the time redundancy was declared. She expected to earn Kshs. 11,000 per month in salary, in accordance with the minimum wage guidelines. She did not go on annual leave for 4 years. She told the Court on cross-examination she was an accounting officer and conversant with the Respondent's finances. Redundancy was not genuine. She did not know if work diminished warranting

declaration of redundancy.

#### **4<sup>th</sup> Claimant, Kilio**

7. She, at the time of giving evidence in the proceedings herein, was a Teacher at St. Jude School Mombasa. She last earned from the Respondent, a salary of Kshs. 9,000 per month. She was issued the same redundancy notice issued to her Colleagues. She ought to have been earning Kshs. 15,000 per month. Her position was comparable to Clerical Officer. She is a Trained Teacher. She exhibited her Teacher's Certificate in Early Childhood Education, issued by the Ministry of Education. What was paid to her was too little. She should have earned Kshs. 15,000 comparable to Teachers in Public Schools. She admitted on cross-examination she accepted the terms and conditions of her employment from the beginning. There is no scale of fees for Private School Teachers. It is a personal arrangement between the Individual and the Private School. The amount she claims is what she deserved according to her own research. She agreed the claim must conform to the law. She did not provide the Court with a breakdown of underpayments. She had a loan with the Bank which was guaranteed by the Employer. She had a Sacco loan of Kshs. 31,860. She did not have evidence showing the loan was repaid. There would be no problem if the Respondent deducted these obligations from her terminal dues. She clarified upon redirection that the Respondent has not repaid the Bank loan. She had been engaging the Bank directly on repayment. NGOs too, have an obligation to meet the minimum wage law.

#### **5<sup>th</sup> Claimant, Mbinya**

8. She told the Court like Kilio, she is a Teacher. She exhibited her Pre-School Teachers In-Service Course Certificate, issued by the Ministry of Education. She earned Kshs. 8,500 in monthly salary. She had just returned from maternity leave when the redundancy notice issued. After she left, the Respondent employed another Teacher. She testified Kshs. 11,000 was the legal rate, not Kshs. 8,500. She made verbal demands on her Employer to pay the correct salary, she told the Court on cross-examination. She did not believe redundancy was genuine. A new Teacher was employed after she left. She did not state this in her Pleadings. There was work, but no money. It was prudent for the Employer to declare redundancy if there was no money. She declined the redundancy benefits offered by the Respondent. The sum was below her expectation. The Claimants rejected what was offered on the advice of KUDHEIHA.

### **CLAIMANTS' SUBMISSIONS**

9. **NOTICE PAY:** The Claimants submit redundancy notices issued on 31<sup>st</sup> May 2012. They were effective the following day. There was no notice as envisaged by the law. The prayer for notice pay is justified under Section 35 and 36 of the Employment Act 2007. **SERVICE PAY:** They submit they are entitled to service pay under Section 35 [5] of the Act. The number of years worked, are shown through the letters of appointment and termination. They cite "2011 Regulation of Wages Act" in adopting the rate of 15 days' salary for each year completed in service. **UNDERPAYMENTS:** It is submitted the Claimants had been agitating for wage increment from the year 2010. They state they violently did this in 2011 and were dismissed and later reinstated. The claim is based on the Regulation of Wages Order. **ANNUAL LEAVE PAY AND TRAVELING ALLOWANCE:** 3<sup>rd</sup> Claimant argues she did not go for annual leave in 4 years. She only went on maternity leave. She was entitled to annual leave pay under Section 28 of the Employment Act 2007. Traveling allowance was granted to her through the letter from the Respondent, dated 23<sup>rd</sup> October 2010. **4<sup>th</sup> and 5<sup>th</sup> CLAIMANTS' ELIGIBILITY UNDER THE REGULATION OF WAGES AND CONDITIONS OF EMPLOYMENT ACT/ LABOUR INSTITUTIONS ACT:** These two Claimants submit that although they were Teachers employed in a Private Institution, their wages should have been regulated by the Wage Orders. They were Members of KUDHEIHA, and governed like all the other Employees, by the Regulation of Wages and Conditions of Employment Act [repealed through the Labour Institutions Act]. They should not have been paid less than Teachers under the TSC as this would amount to discrimination under Section 5 of the Employment Act 2007. The Claimants submit they have established their respective claims.

### **RESPONDENT'S EVIDENCE**

10. Director and Pastor, Gilbert Ochieng' testified the Respondent is a Charitable Organization, registered under the NGO Act. It is funded by donors from Sweden. Salaries were prepared by the Administrator and evaluated by the Board. The Board determined what was to be paid. Every year the Board prepared a budget. It was forwarded to Sweden. The Donor determined what to pay. The Respondent was accordingly advised by Star of Hope International Sweden. The Respondent does not operate under the Ministry of Education.

11. Mghona was an ex-convict. He trained the Carpenters in the Workshop. Ochieng' gave Mghona the Instructor's role in the carpentry workshop. He and the other Claimants left employment after their positions were declared redundant.

12. Ochieng' did not have funds to run the Organization. The Donor cut the funding by 50%. Kshs. 500,000 was required to pay salaries. The Respondent was receiving about Kshs. 400,000 -500,000 per month. Ochieng' pleaded for more funding with the Donor. He notified KUDHEIHA and the Ministry of Labour, of his intention to declare redundancy due to the financial constraints. The Respondent engaged in small scale poultry farming, to supplement its income. Each Employee was offered what they were entitled to. They accepted computations in the presence of KUDHEIHA Officials. They were offered service pay, notice pay, days worked, and pending annual leave. Some received what was offered. The Claimants declined and came to Court. 13 out of 18 Employees affected by the redundancy accepted their dues, while the 5 Claimants disputed what was availed and came to Court.

13. The Witness agreed some of the Claimants were paid below the minimum wage. The County Labour Office guided the Respondent in determining terminal dues. Mghona served for less than 4 years. Chenye was not a qualified Book-keeper and joined in 2004 straight from school. Auditors had recommended her removal. She took annual leave. She was earning leave traveling allowance of Kshs, 2,000 without the approval of the Board. It was a privilege, not demandable. The Witness stopped the payment to Chenye. Kilio had a Bank loan of over Kshs. 89,000. She had in addition, a Sacco loan. The Respondent would still be demanding money from her on payment of terminal dues. Mbinya had not completed 3 years in service. Ochieng testified he would concede underpayments to Mghona, Sese, and Chenye. He would not admit to have underpaid Kilio and Mbinya. If the Claimants accepted what the Respondent offered to them, the litigation would not be necessary.

14. Cross-examined, Ochieng' testified he was employed by the Respondent in 1998. He resigned in 2004, and returned in 2011 as a Director appointed by the Donor. The Respondent is a Charitable Organization, dependent on donor funding. It charges a minimal commitment fee, of about Kshs. 300 per term, to pupils. Employees had many grievances. They boycotted work shouting 'underpayment!' Chenye was employed as a Book-keeper. Ochieng' had issues with her qualifications but was overruled by the Chairman. The Respondent retained several ex-convicts. It had 13 of them, at the time Ochieng' testified. The Respondent assists ex-convicts to integrate. They are taken in on the recommendation of the Prisons. The sole reason for taking them in is to integrate them.

15. Ochieng' availed documents he had passed on to the Labour Office, showing reduction in donor funding. He found Mbinya already in employment at the time he joined. She was earning Kshs. 5,400 per month. The Witness adjusted this to Kshs. 9,000 per month. He adjusted this, expecting more donor funding.

16. Redundancy was preceded by consultation with KUDHEIHA. Ochieng' could not recall the date of the meeting. Kilio left before she could complete paying her Bank loan. Ochieng was aware the Bank continued to pursue the debt directly against Kilio. It was wrong to offer Mghona Kshs. 3,000 in notice pay. He was earning Kshs. 7,000 per month. Ochieng was not aware the Claimants had confined their claims for underpayments to 3 years, while most of them worked for over 3 years. If underpayment is tabulated within the minimum wage regulation, the Respondent would not have objection in paying.

## **RESPONDENT'S SUBMISSIONS**

17. The Respondent argues the Certificate produced by Mghona did not specify if he was a Carpenter

Grade 1, 2 or 3. He was deemed an ungraded Artisan, whose rate was Kshs. 11,580 and not Kshs. 17,118 as per the legal notice number 71 of 2012. Sese was a Guard-cum- Gardener and entitled to Kshs. 8,579 per month. Chenye was a Book-Keeper not a Cashier. There is no provision for Book-Keepers in the Wage Orders. She was not a General Clerk. She does not merit Kshs. 11,684. Her correct rate was Kshs. 7,140. The last two Claimants were Teachers, contracted by the Respondent, and outside the purview of the Wage Orders. They agreed on terms and conditions of employment with the Respondent. These were reviewed from time to time, and accepted by the two Claimants. They did not state which law justifies their claims for underpayment.

18. The Respondent submits the Claimants are entitled to severance pay at the rate of 15 days' salary for every year completed in service. 1<sup>st</sup> Claimant merits Kshs. 17,370; 2<sup>nd</sup> Claimant Kshs. 34,319; 3<sup>rd</sup> Claimant Kshs. 28,560; 4<sup>th</sup> Claimant Kshs. 99,000; and 5<sup>th</sup> Claimant Kshs. 13,500, in severance pay in accordance with Section 40 of the Employment Act 2007.

19. It is submitted that the Claimants are entitled to underpayment of wages in accordance with Section 68 and 69 of the Employment Act 2007. 1<sup>st</sup> and 2<sup>nd</sup> Claimant should be paid the underpayments accrued between December 2011 and May 2012. The underpayments should not go back beyond the period of limitation given under the Employment Act 2007. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants are not entitled to underpayments on the grounds submitted above. The 3<sup>rd</sup> Claimant forfeited her annual leave, and does not merit unauthorized traveling allowance. Further claims of annual leave pay dating back to the year 2006, and leave traveling allowance, are statute-barred. 4<sup>th</sup> Claimant's annual leave for 2010 fell in June 2010, and her claim ought to have been made latest June 2013. It is statute- barred. Mbinya had a Bank Loan and Sacco loan, totaling Kshs. 121,797. This should be offset against her terminal dues admitted by the Respondent to comprise notice pay at Kshs. 9,000 and severance at Kshs. 99,000 – total Kshs. 108,000. Offset, the result is that Mbinya owes the Respondent Kshs. 13,797.

20. Lastly the Respondent submits Parties should meet their costs of the Claim. The Respondent has always been willing to settle the Claim. The Claimants rejected the terms of settlement. The Respondent is a Charity taking care of needy Children.

**The Court Finds: -**

21. The Claimants were employed by the Respondent International NGO, on dates and in designations shown at paragraph 1 of this Award. The 1<sup>st</sup> Claimant worked from 24<sup>th</sup> June 2009. It was stated his contract was for 6 months, which was renewable. The Court presumes this was renewed, and the 1<sup>st</sup> Claimant left employment on 1<sup>st</sup> June 2012. He had worked for about 3 years. It is not clear why he bases his Claim on 4 years of service. He last earned a monthly salary of Kshs. 5,500.

22. The 2<sup>nd</sup> Claimant, Sese was employed on 1<sup>st</sup> January 2004, leaving on 1<sup>st</sup> June 2012. He had completed 8 years in employment, not 9. His Witness Statement indicates he last earned a monthly salary of Kshs. 6,200.

23. The 3<sup>rd</sup> Claimant, Chenye joined the Respondent on the 28<sup>th</sup> June 2004, and left 1<sup>st</sup> June 2012, having completed 8 years in employment. Her last monthly salary is indicated to be Kshs. 7,140.

24. The 4<sup>th</sup> Claimant Kilio was appointed as a Nursery School Teacher, with effect from 8<sup>th</sup> January 1990, and left alongside her Colleagues, on the 1<sup>st</sup> June 2012. She had worked for 22 complete years. She earned a monthly salary of Kshs. 9,000 on exit.

25. The last Claimant Mbinya, worked from 2<sup>nd</sup> June 2009 to 1<sup>st</sup> June 2012. She had a neat, complete 3 years of service. She last earned a salary of Kshs. 9,000 as shown in her pay slip.

26. All the Claimants left employment on 1<sup>st</sup> June 2012, upon the Respondent declaring their positions redundant. Termination was therefore under Section 40 of the Employment Act 2007, as read together

with Section 43 [proof of termination reason] and Section 45 [termination for operational reasons]. Termination was not based on Sections 35 and 36 as submitted by the Claimants.

27. There was sufficient evidence that redundancy was genuine, necessitated by the Respondent's lack of adequate finances. The Respondent is a Charity, funded by Donors from Sweden, and whose only supplemental income is from small scale poultry farming and minimal commitment fees charged on the Pupils. It was clear in the evidence of the Director and Pastor Gilbert Ochieng' that the level of donor funding was insufficient to retain the Claimants. The Claimants themselves testified they have been agitating for pay increment and sometime in 2011 boycotted work demanding for pay rise. This led into termination of their contracts of employment, but the Respondent was compelled to reinstate the Claimants through political pressure exerted by local leaders. These disturbances portrayed an Employer with perennial financial inability, to meet its wage bill. The Court is satisfied the Respondent is a non-profit making charitable Institution, largely dependent on donor funding, and whose flow of funds was quite limited at the time the Claimants' positions, were declared redundant. Redundancy was genuine, the next question being whether it was in conformity with the procedure set under Section 40 of the Employment Act 2007.

28. The law under Section 40 requires the Employer gives a notice of not less than 30 days prior to the date of the intended termination, to the Trade Union where the Employee is a Member of the Trade Union, and to the Local Labour Office. If the Employee is not unionized, he is to be notified in Person, and the Labour Office similarly notified. The notice must reveal the reasons for, and extent of redundancy. Other requirements involve clear information from the Employer to the Employees on the selection criteria. Regard must be had for the Employee's seniority in time, skill, ability and reliability. Non-union Employees, who do not enjoy the presence of a CBA, are not to be disadvantaged in payment of terminal benefits. The Employee is to be issued 1 month notice, or one month salary in lieu of notice. There are 2 notices contemplated under Section 40. The first is under Section 40 [1] [a] of the Employment Act 2007, which by its wording contemplates there is subsequent tripartite consultation on the reasons and extent of redundancy; and the second notice under Section 40 [1] [f] which is a notice in the mould of the notice under Section 36 of the Employment Act 2007. The first notice is not merely informative, it is supposed to open the door for a 3 way dialogue, involving the Parties in whose names the notice is issued and addressed. The last notice assumes the processes under the previous notice have been undertaken and finalized. The law requires also that the Employer pays severance pay, not service pay, of not less than 15 days' salary, for every year completed in service. Outstanding leave days must be paid off.

29. Importantly, Section 40 states an Employer shall not terminate the Employee's contract of employment, unless the Employer has complied with the conditions outlined under Section 40. The payments of severance pay, notice pay, and outstanding annual leave days, must be made before termination. The refrain under Section 40 is that the Employer "has paid." The law does not state that the Employer "shall pay." The Employer shall not terminate the Employee's contract of employment, unless all the conditions under Section 40 have been met. Redundancy dues must be paid before termination. What most Employers do, as did the Respondent herein, is tabulate redundancy dues, terminate and advise Employees when to collect their dues at a later date. Redundancy dues must be paid before termination. Failure to meet any of the conditions under Section 40, which includes payment of all terminal dues before termination, would result in an unfair and unlawful termination.

30. The Respondent issued a notice to the Claimants; the Trade Union; and the Labour Office on 31<sup>st</sup> May 2012. Termination was effective the following day. There was an attached letter to the notice, advising the Employees how and when they would collect their dues at a date subsequent to the termination. In the view of the Court and relying on the law as discussed above, the procedure was flawed. There is no evidence the Respondent considered the elements contained in Section 40, in the process leading to the Claimants' exit. Termination was unfair on account of procedure. ***The Claimants are granted 9 months' salary each, in compensation for unfair termination under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Act.***

31. On the rates of pay, it is clear to this Court the 4<sup>th</sup> and 5<sup>th</sup> Claimants were Teachers, employed by a

Private Institution, and who negotiated their own packages with their Employer. Although they claim to have been Members of KUDHEIHA, they did not provide the Court with a Collective Bargaining Agreement, concluded between KUDHEIHA and the Respondent, which covered them as Teachers. The Court takes judicial notice that KUDHEIHA represents non-teaching staff in Education Institutions. Kilio testified she was demanding a higher rate of pay, based on her market research. Both Teachers feel they were undercut, based on the comparable rates paid to Teachers in the public service. Wage increment cannot be based on an individual's market research. There are instruments and mechanisms for wage review in different sectors. The Teachers in public service have their structures of wage adjustment. Teachers have the option of seeking employment in the private or public sectors. Once in the private sector, they are not guided by the structures in the public sector. They do not have a Trade Union which negotiates collectively. They are not covered under a specific wage order. They negotiate their own terms and conditions of employment with their Employers, and provided what they have agreed does not breach the minimum wage law set by the Government across the industries, they cannot be heard to lament that what they are earning is too little. The two Claimants do not say they were paid below the general minimum wage; they allege they should have been earning a certain amount as Nursery School Teachers. They did not focus the attention of the Court on any specific wage instrument, affording them the higher rate they demand. It was submitted for the two Claimants that the Court should at the very least consider the two Teachers 'General Labourers' and find they were underpaid considering the rate availed to General Labourers under the Wage Order. The Court understood this to mean that the two Claimants were paid below the general wage floor, as General Labourers occupy the bottom of the pile. The Regulation of Wages [General] [Amendment] Order 2012, set the basic, minimum monthly wage for General Labourers on monthly contracts, in Mombasa, at Kshs. 8,579. Teachers are not 'General Labourers,' but to answer their submission, they accepted and earned Kshs. 9,000 monthly, above the basic pay for General Labourers. ***Their claims for underpayment of wages; their adoption of Kshs. 11,684 as their rightful monthly salary rate; and their argument that they should have been earning Kshs. 15,000 per month, have no foundation in law or fact and are rejected.***

32. The 4<sup>th</sup> Claimant, Kilio, shall be paid 1 month salary in lieu of notice at Kshs. 9,000; severance pay at 15 days' salary for 22 years completed in service [Kshs. 9,000 divide by a maximum of 26 working days in a month = Kshs. 346.15 per day x 15 days= Kshs. 5,192 x 22 years completed in service= Kshs. 114,230]; together with compensation as granted above at Kshs. 9,000 x 9 = Kshs. 81,000. ***In total the 4<sup>th</sup> Claimant shall be paid Kshs. 195,230.***

33. The 5<sup>th</sup> Claimant, Mbinya, shall be paid 1 month salary in lieu of notice at Kshs. 9,000; severance pay at 15 days' salary for 3 years completed in service [Kshs. 9,000 divide by 26 days of work = Kshs. 346.15 per day x 15 days = Kshs. 5,192 x 3 years completed in service = Kshs. 15,576]; together with compensation for unfair termination the equivalent of 9 months' salary at Kshs. 81,000. ***In total the 5<sup>th</sup> Claimant shall be paid Kshs. 96,576.***

34. The 3<sup>rd</sup> Claimant Chenye was described as a Book- Keeper in her letter of appointment. She reported to an Accounts Clerk, and in the absence of the Accounts Clerk, to the Chairman of the Management Committee. Chenye confirmed in her evidence she was a Book-Keeper, earning as of the last day of employment, a monthly salary of Kshs. 7,140. The term Book-Keeper is not captured in the Wage Order of 2012. In the view of Court, Chenye was in the position equivalent to that of a General Clerk, answerable to the Accounts Clerk and the Chairman. She ought to have been earning a minimum salary of Kshs. 13,214.60 per month applicable to General Clerks in Mombasa, as of May 2012. Kshs. 7,140 paid to her was way below the minimum wage in 2012, and other years before 2012. The Claimants quite reasonably, have all restricted their claims for underpayment to 3 years preceding termination. There is no merit in the argument raised by the Respondent on limitation of time. This Court has taken the position in its past decisions that all terminal dues must be paid to an Employee upon exit. Claims for underpayments, arrears of salary, or accrued annual leave, are not defeated by the passage of time. The Employer in effect renews the date of accrual of action, each time the specific claim remains unpaid. 3 years proposed by the Claimants, adopting the rate of 2012, is a reasonable mode of redressing years of underpayment. Tracing back the actual underpayments from the date of their accrual would have the result of crippling the work being carried out by the Respondent. The Director Ochieng, to his credit

conceded Employees were underpaid. The 4<sup>th</sup> Claimant was able to show she did not take annual leave for 4 years. The Respondent did not buy off her annual leave entitlement. The Court is similarly persuaded her claim for traveling allowance is merited. Employers do not confer benefits on Employees, and later withdrawal such benefits citing lack of authorization. Unless the benefit is shown to be illegally conferred, the Court cannot sanction its withdrawal. Traveling allowance in the case of the 3<sup>rd</sup> Claimant was included in her contract through a letter issued by the Respondent. It was a benefit legally conferred, and which should not have been unilaterally recalled.

35. The 3<sup>rd</sup> Claimant shall be paid underpayment of salary for 3 years, calculated as follows: Kshs. 13,214 .60 – Kshs. 7,140 = Kshs. 6,074 per month x 36 months= Kshs. 218,664. She is to be paid 1 month salary in lieu of notice at Kshs. 13,214; severance pay at [Kshs. 13, 214.60 divide by 26 days = Kshs. 508.25 x 15 days = Kshs. 7,623 x 8 years = Kshs. 60,990 .50]; 84 days of pending annual leave x daily rate of Kshs. 508.25 =Kshs. 42,693; and 1 year of traveling allowance at Kshs. 800 per month= Kshs. 9,600. The 3<sup>rd</sup> Claimant shall be paid 9 months' salary in compensation for unfair termination, at Kshs. 13,214.60 x 9 = Kshs. 118,926. ***In total the 3<sup>rd</sup> Claimant shall be paid Kshs. 464,087.60.***

36. The 2<sup>nd</sup> Claimant, Sese, worked as a Guard. He was granted additional duties of gardening. In his Witness Statement, he gives his monthly salary as Kshs. 6,200, while in his evidence, he told the Court he was paid Kshs. 7,000 monthly. He was not clear on the last salary earned. The Court agrees with the submission of the Respondent that under the Wage Order of 2012, the 2<sup>nd</sup> Claimant should have been earning Kshs. 8,579.80. Assuming he was paid Kshs. 7,000, he would be entitled, for purposes of redressing the claim for underpayment, to Kshs. 1,579.80 per month x 36 months = Kshs. 56,872.80. He is granted 1 month salary in lieu of notice at Kshs. 8,579.80. His severance pay is granted at [Kshs. 8, 579.80 divided by 26 days = Kshs. 329.99 x 15 days =Kshs. 4,949.88 x 8 years completed in service = Kshs. 39,599]. He is allowed 9 months' salary in compensation for unfair termination at Kshs. 8,579.80 x 9 = Kshs. 77,218.20. ***In total, the 2<sup>nd</sup> Claimant shall be paid Kshs. 182,269.80.***

37. The 1<sup>st</sup> Claimant, Mghona, was an instructor assigned instructional role, in the Respondent's Workshop. The Respondent testified the 1<sup>st</sup> Claimant is an ex-convict, employed on the recommendation of the Prisons. The Respondent employs many such other ex-convicts. The Court is not concerned with the actual motive in employment of ex-convicts. Its concern is whether the 1<sup>st</sup> Claimant was paid a salary commensurate with his skills and qualifications, as guided by the Wage Order. The 1<sup>st</sup> Claimant was paid a sum of Kshs. 5,500 per month.

38. He was not an ungraded Artisan as argued by the Respondent. His National Trade Test Certificate indicates Grade 1. He was tested for, and passed a Grade 1 Trade Test. He was an Artisan Grade 1. This Grade 1 enabled him to be at the Head of the Workshop, instructing other Carpenters on production of Prison furniture we all love. His rate of pay, as of 1<sup>st</sup> May 2012, ought to have been Kshs. 19,360.50 per month. He was paid Kshs. 5,500- the difference being Kshs. 13,860 .50. He was underpaid by Kshs. 13,860.50, which for the reasonable period of 3 years the Court had endorsed, would amount to Kshs. 498,878. He is granted Kshs. 498,878 in underpayment of salary. He is granted Kshs. 19,360 in notice pay; and severance pay [at Kshs. 19,360.50 divide 26 days =Kshs. 744.60 x 15 days =Kshs. 11,169.20 x 4 years = Kshs. 44,676.80]. Compensation for unfair termination is granted at Kshs. 19,360.50 x 9 =Kshs. 174,244.50. ***In total, the 1<sup>st</sup> Claimant shall be paid Kshs. 737,159.30.***

39. The Court does not think Sections 68 and 69 of the Employment Act 2007, cited by the Respondent, have any application in the dispute herein. These provisions relate to insolvency of Employers. In issue here is redundancy, the applicable law being Section 40 of the Employment Act 2007. There was no suggestion that the Respondent is under any form of insolvency. The Claimants similarly did not aid the Court by their reference to '2011 Regulation of Wages Act' in their Submissions. It is important Parties and their Representatives assist the Court by accurate reference to the relevant laws. Lastly, the Respondent did not make a counterclaim for any amounts owed to the Respondent by the Claimants. The Court is not able to make an order for offsetting of the sums awarded to the Claimants, against any claims the Employer may have had on termination.

IN SUM, IS ORDERED:-

- a. *Redundancy was justifiable, but flawed in the procedure of its execution.*
- b. *Termination was therefore unfair.*
- c. *The Claimants are granted terminal dues and compensation as tabulated in the body of this Award, with the following sums to be paid to the respective Claimants:*

- i. *1<sup>st</sup> Claimant – Kshs. 737,159.30*
- ii. *2<sup>nd</sup> Claimant – Kshs. Kshs, 182,269.80*
- iii. *3<sup>rd</sup> Claimant- Kshs. 464,087.60.*
- iv. *4<sup>th</sup> Claimant- Kshs. 195,230.*
- v. *5<sup>th</sup> Claimant- Kshs. 96,576.*

*d) The Respondent shall release to the Claimants their Certificates of service.*

*e) Parties shall meet their costs of the litigation.*

*f) The sums awarded shall be paid to the Claimants by the Respondent, within 30 days, of the delivery of this Award.*

*g) Interest allowed at 14% per annum from the date of the delivery of the Award, payable if the full amount remains unpaid within the given 30 days.*

Dated and delivered at Mombasa this 4<sup>th</sup> day of March,2016

James Rika

Judge