



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 299 OF 2013

ROBERT KENGA

LILYAN WEDDAHCLAIMANT

VERSUS

OCEAN SPORTS RESORTRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimants have brought this suit accusing the respondents of unfair termination of their employment on 29/7/2013 and seeking to recover accrued employment dues plus compensation for the unfair dismissal. The claimants aver that the reason for their dismissal was invalid and they were denied a chance to defend themselves as provided for under the law.
2. The respondent has however denied liability and prayed for the suit to be dismissed. It is the defence case that the claimants were summarily dismissed for gross misconduct and that a fair procedure was followed by according the claimants a chance to defend themselves. In addition, the respondent avers that the claimants are barred by the collective Bargaining Agreement (CBA) from claiming salary in lieu of notice because their termination of services was through summary dismissal.
3. The suit was heard on 16/12/2013, 18/9/2014 and 3/11/2014 when the 1st and 2nd claimants testified as CW1 and Cw2 respectively. The respondent called Florian Biziere and Edmund Baya as Rw1 and RW2 respectively. Thereafter counsel for both sides filed written submissions.

CLAIMANT'S CASE

4. CW1 (Robert Kenga) told the court that he was employed by the respondent in February 2009 and worked upto 19/7/2013 when he was summarily dismissed for not performing his work properly. The letter for dismissal was dated same date. He denied the alleged improper performance and duty and maintained that he did nothing wrong in the circumstances. He explained that on 21/7/2013 morning, he received ksh.9000 from a security guard who told him that it was payment for accommodation by 2 guests who had come the previous night. According to CW1, the guard told him that CW2 had authorized the transaction. CW1 was not given the names of the guests and as such he kept the money in the office safe pending issuance of receipts after getting the details of guests from CW2.
5. When CW2 came after half an hour, she asked CW1 about the ksh.9000 and promised to pursue the guests to formally check in. At 11am, when guests normally check out, the 2 guests who paid

- the ksh.9000 did not check out and the CW2 and housekeeper went to the room but the guests reportedly said they should not be disturbed. CW1 explained that by 5pm the CW1 and the Housekeeper went again to check the guests at the room but they found that they had already left. CW1 then left the money in the safe and went home without issuing any receipt due to lack of the details of the guests.
6. CW1 further told the court that on 23/7/2013, the system for check in resumed working and he receipted the ksh.9000 as accommodation charges without citing the name of the guests. On 25/7/2013 at 4.45 pm he was however called by the HR Manager (HRM) and the General Manager (GM) to confirm whether he received money from the security guard and state where the money was. CW1 confirmed the receipt of the said money and indicated that the information was contained in the daily report. After 10 minutes, CW1 was called again and asked why he did not receipt the money the same day he received it and why the details of the guests were missing. On 29/7/2013 at 4.45pm, CW1 was served with a dismissal letter and asked to hand over. He lodged and appeal but it was not successful. He also attempted conciliation through his union but again in vain.
 7. He prayed for 2 months in lieu of notice as per the 2012 CBA. He also accused the respondent of salary underpayment and prayed for the arrears. He explained that under the CBA he was in Grade 8 and in July 2012 was entitled to a basic salary of ksh.19000 but he was receiving ksh.16500. He contended that he was entitled to salary increment by 10% in July 2012 and a further 11% in July 2013. He also prayed for service charge of ksh18650 plus 10 leave days for 2013. He also prayed for leave travelling allowance, compensation, and costs.
 8. On cross examination by the defence counsel, CW1 confirmed that he started as a cashier earning Ksh.8400 per month before he was promoted to be the Head Cashier. His salary was since 2011 increased to Ksh.22078. He further confirmed that he has 3 cashier under him. His duties as Head cashier included receiving payments from guests for food, drinks and accommodation. He explained that the policy about guests who report at night is that they are received by the night guards after which he calls the receptionist or reservation manger for directions on prices and if the guests agrees the guard gives him a room. According to CW1, the guard has no authority to receive any money or check in the guests in the computer system. The checking in is done by the receptionist or Reservation Manager the following day and then forward the details to CW1 to create an account for the guests in the computer system and ensure that the guests does not leave the premises without paying his bills. CW1 explained that at times the systems went down but never failed. He further explained that the system was low from 20/7/2013 to 23/7/2013 when he entered the ksh.9000 into the system.
 9. He however maintained that the reason for not issuing a receipt for the said money is because there was no identity given for the payee guests. According to CW1 issuing a receipt would have required an ETR receipt which was problematical without the name of the guests. He admitted that the money in issue was given to him by Mr. Mwayele, a security guard on 21/7/2013 morning. CW1 maintained that by the time the GM called him for questioning, he had already recorded the money and banked it. He further maintained that his duty was to collect money and ensure that the employer never lost any money. He clarified that the duty of ensuring that clients records were properly kept was by CW2. He further maintained that the watchman gave him only money minus the details of the paying guests. CW1 admitted that he receipted the ksh.9000 in a new receipt book while there was another open receipt book but contended that he had the authority to do so.
 10. CW1 contended that he was given clearance papers to sign but no payment was given to him on ground that he had been summarily dismissed. He further contended that under the CBA a member of job Grade 8 like himself the basic salary in 2012 was ksh.19000. He however explained that by July 2013 he was still receiving ksh.19800. He admitted that the employer had tabulated his dues in the sum of ksh.41008.44.
 11. On re-examination by his counsel, CW1 stated that he worked for the respondent for 4 years. He also clarified that he did not have in his custody the old receipt book when he opened new receipt book. He further explained that in July 2012 his basic salary was ks.16500 and house allowance of ksh.5573 totalling to ksh.22073. He stated however that the CBA provided for ksh.19000 basic and ksh.6130 house allowance totalling to ksh.25130. He contended that he continued to receive ksh.19000 until November when it was increased to ksh.19800 basic and house allowance of

ksh.6130 to total to ksh.25930. According to CW1, the CBA gave him 10% increase from July 2012 making his basic pay

ksh. 20900 and house allowance of ksh.6130 which total to ksh.27030. In addition he contended that from 1/7/2013 the CBA gave him 11% pay increment to Ksh.22990 basic and ksh.6805 house allowance totaling to ksh.29,795. He stated however that he continued to receive ksh.25930 until July 2013 which amounted to an underpayment.

12. CW2 stated that she was employed by the respondent on 1/9/2007 as a receptionist and later she was promoted to become Head of the Front office. Her basic salary was ksh.19800 plus house allowance of ksh.6130 per month. She explained that on 21/7/2013 at 1.00am she received a phone call from Edmond, a security guard notifying her of the arrival of a guests who wanted accommodation including bed and breakfast. In response, CW2 directed the guard to receive ksh.9000 from the guests as the cost of the service pending checking in by CW2 later in the morning. When CW2 reported to work that morning, she confirmed that CW1 had already received the ksh.9000 from the guard. She then told CW1 that she would deal with the matter.
13. CW2 further explained that she went to guests room with the house keeper but the guests did not wish to be disturbed. CW2 then instructed the House Keeper to tell the guests to go the reception to formally check in and went to report the matter to CW1. The guests never went to check in and when CW1 returned in the evening to ask CW2 about the matter, CW2 went to the guests room again with the House Keeper only to find that the guests had already left without giving his details. CW2 notified CW1 of the departure of the guests and the matter ended there that day.
14. CW2 explained that, on another day CW1 asked her how to deal with the Ksh. 9000 and she advised him to receipt the money under accommodation because they had no guests details. According to CW2, that is the best she could have done in the circumstances. However that on 25/7/2013 at 4pm she was called for questioning by the GM and the HRM of the respondent and later she was summarily dismissed. She reported the matter to her trade union and later appealed to the employer against the dismissal. According to CW2, she did not deserve the dismissal and prayed for three months salary in lieu of notice, service pay for 6 years, service charge, leave travelling allowance, leave for 2 months on pro rata basis, salary underpayment plus compensation and damages. He prayed for ksh.32701 for underpayment.
15. On cross examination by the defence counsel, CW2 stated that her salary in October 2010 was Ksh.22073 while in 2012 it was ksh.25930. She explained that under the CBA, her basic salary was ksh.19000 increased by 10% from July 2012. The salary was however increased only to ksh.19800 instead of ksh.20800. She further explained that the CBA provided for further increment of 11% to raise her salary to Ksh.29795 but the employer continued to underpay her.
16. She admitted that her duties included checking in and checking out guests. She also admitted it was her duty to keep copies of the identification documents for the guests. She agreed that her junior Mr. Ronald had earlier been dismissed for receiving guests and failing to record their details. She further agreed that maintaining records of the guests was a legal requirement. She however denied ever seizing the guests who slept in Room 15 on 21/7/2013 without giving their details. She contended that the guests were received by Edmond, a guard who never gave CW2 the details of the guests. According to CW2, it was not the first time for a guests to stay in the hotel without checking in and cited a case where the GM had brought a guests in the same manner.
17. CW2 admitted that she was given a warning letter on 9/7/2013 for poor management of bookings for Zambian. She further admitted that on 27/7/2013 police officer were called to the hotel because some guests were checked in in Room 16 without details being taken. She further admitted that the guests fled leaving 3 empty bags and Alshabab materials. CW1 however explained that the photocopies and the scanner were not working from June 2012 to June 2013 and no details of all the guests for the period were taken. That when the scanner was repaired CW2 was never trained on how to save a scanned document. She further explained that the only place to photocopy reservation forms was at the store but the machine did not have a place to insert a passport. She maintained that the manner of her termination was not good to her. She denied ever being issued with a certificate of service. She contended that the tabulation of her dues by the respondent was wrong because it was based on a basic salary of ksh.19000 yet her lawful pay was much higher.

18. On re-examination by her counsel, CW2 maintained that at all material times to this suit the photocopier and the printer were not working and as such a failure to keep copies of guests identification documents was not intentional. She contended that the police never questioned her on 27/7/2013 when they came to the hotel. She maintained that her salary was underpaid by ksh.4947 per month because she was receiving Ksh. 22073 upto October 2012 yet the CBA provided for ksh.27030 effective July 2012. In addition she contended that her salary from November 2012 was increased to ksh.25930 instead of the said ksh.27030 under the CBA. That the said salary of ksh.25930 continued until July 2013 yet from July 2013 she was entitled to salary increment of 11% to make her basic salary ksh.22990 and house allowance ksh.6805 to total to Ksh.29795. She concluded by stating that her alleged poor performance led to no loss to the employer.

DEFENCE CASE

19. RW1 is the GM for the respondent. He confirmed that CW1 and CW2 were employed by the respondent as cashier and receptionist. He explained that on 23/7/2013, the HRM Rehema Abdalla took directors to see the hotel rooms and in the process they noticed that Room 7 had been used but not recorded at the reception. When they enquired from the guests, they said that they only knew of room 15 which they (guards) gave keys to a guests who came in the night and received money which they placed on the reception desk together with the check in forms. RW1 explained that the guests had allegedly visited on 20/7/2013 but as at 24/7/2013, the money from the guests had not been recorded in the reception book. He only saw the receptionist on 25/7/2013. According to RW1 the cost of the room per night was ksh.9000 and the guests stayed only for one night.
20. RW1 called the claimants to give their version of the case of the guests who boarded on 20/7/2013. The meeting was also attended by his wife Emily (the GM then) Rehema the HRM and no union representative attended. According to RW1, CW1 admitted receiving the money and failing to issue a receipt. RW1 explained that the procedure at the hotel is that the receptionist receives money and part particulars of the guests and then passes the same to the cashier to issue receipts. According to RW1, the money was recorded under receipt No. 401 backdated to 23/7/2013.
21. RW1 further stated that CW1 received a guests on 27/7/2013 and gave a room without any identification documents. According to RW1, the guests disappeared and left behind screw driver and newspapers. RW1 explained that every guests must fill an information form at the reception and the hotel takes photocopy of his identification documents which is attached to the said form. RW1 admitted that the photocopier was not working on 27/7/2013 but maintained that the scanner was working. He further admitted that the guests who came to the hotel on 20/7/2013 were received by the guard and left no identification documents.
22. RW1 clarified that the claimants were dismissed on 29/7/2013 on recommendation by the former GM. He admitted that the claimants were in the same salary scale and were both earning ksh.25680 but denied that they were entitled to any salary increment. He denied the claim for salary underpayment. He concluded by stating that the dismissal of the claimants was fair because they were given a hearing before dismissal.
23. On cross examination by the claimant's counsel, RW1 said that he found the claimants working for respondents when he was employed there. He admitted that the guests who came on 20/7/2013 night were received by the guard and paid him Ksh.9000. He further stated that the guard left the money in a clipboard at CW1's desk and assigned the guests a room. RW1 contended that the money was receipted after he left office on 24/7/2013. He maintained that the guests filled a guests form on 20/7/2013 and the guard kept it in the clip board together with the money on CW2's desk. RW1 explained that CW2 told him during the hearing on 26/7/2013 that she could not get the details of the guests because she found him asleep in the room. Regarding the receipt No. 401, RW1 admitted that the receipt was without the name of the client because his details were never given to CW1. RW1 supported the dismissal of the claimant because they failed to handover the money within 48 hours. He admitted that the claimants were not paid their dues and further confessed that he could not remember the actual salary for them.
24. RW2 is a security guard at the respondent. He confirmed that CW1 and CW2 were employed by

the respondent as cashier and receptionist respectively. RW2 explained that on 20/7/2013 at 11.00pm he was on duty at the reception desk when 2 guests a man and a woman came for accommodation. The standby room was number 7 but the lights were faulty but after consulting with CW2, RW2 gave the guests room 15. According to him the guests filled the registration forms. They used identity card and a driving licence which RW2 confirmed that the details were correctly recorded. He did not however take photocopies of the identification documents because the photocopier was not working. At 6.00am RW1 handed over to Mr. Mwayele another guard and went home. RW2 explained that he was called by the HRM on 24/7/2013 to record a statement on how he handled the guests and the money from 20/7/2013 to 24/7/2013. He complied and stated that he handed over the money together with the registration forms to Mr. Mwayele.

25. RW2 further told the court that on 25/7/2013 at 3pm CW2 received 2 guests but she recorded only one guest and assigned them room 16-UP. One of the guests was not resident and he kept on coming and leaving after short intervals while the resident guest kept on covering his face with a cap which raised suspicion among the guards. RW1 further explained that the non resident guest visited his colleague in room 16-UP and one guard at strategic place to watch the 2 guests. The guard saw the guests to room 18 which had been assigned another guest namely a British Army Leader. The guard alerted his colleagues and called police but the 2 guests escaped through the ocean leaving behind 2 suit cases with Al-shabab and Al-Quida newspaper cuttings. When the security team checked the guests register, they found that the guests had not been registered.
26. On cross examination by the claimants counsel, RW2 said that he was employed by the respondent from 2007 as a security guard but with extra duty of manning the reception. He however does not deal with international bookings. He explained that he left the money and registration forms with Mr. Mwayele to pass to CW2 but he gave the same to CW1 instead. RW1 confirmed that the scanner was working. He further confirmed that of the 2 guests received on 25/7/2013, only one was spending the night in the hotel. He admitted that the hotel allows people to visit the guests. According to RW2, CW2 was on the wrong for not registering guests on 25/7/2013 while CW1 did wrong in respect of the ksh.9000 paid on 20/7/2013.

ANALYSIS AND DETERMINATION

27. After carefully considering the pleadings, evidence and submissions by the two sides, it is clear that there existed employment relationship between the claimants and the respondent. There is also no dispute that the said relationship was terminated by the respondent when she summarily dismissed the claimants on 29/7/2013 for alleged gross misconduct. The issues for determination are whether the said dismissal of the claimants was unfair and whether the reliefs sought in the suit ought to issue.

Unfair dismissal

28. Under Section 47(5) of the Employment Act, the burden of proving unfair dismissal is squarely upon the employee who alleges that he was unfairly dismissed. Section 45 of the said Act bars employers from dismissing employees unfairly. Subsection (2) provides:

“A termination of employment by an employer is unfair if the employer fails to prove

(a) that the reason for the termination is valid,

(b) that the reason for the termination is a fair reason -

(i) related to the employees conduct, capacity or compatibility or

(ii) based on the operational requirements of the employer and

(c) that the employment was terminated in accordance with fair procedure”.

29. The 1st claimant was dismissed for failure to receipt Ksh.9000 paid for accommodation. His defence was that he did not know the name of the guests. He also explained that he kept asking for the same from CW2 for all the 36 hours a fact which was confirmed by CW2 and not rebutted by the defence. He further stated that issuing a receipt would require an ETR receipt which was problematic without the name of the paying guests. The foregoing was also not contested by the defence. Lastly he contended that he was denied a hearing on the accusations before dismissal. According to him he was only questioned about whether he received the ksh.9000 from the guards and how he dealt with it but after few days he was summarily dismissed.
30. As regards the 2nd claimant, she was dismissed for failing to reconstruct a lost guest registration form on 21/7/2013 after the one prepared by night guards who received guests allegedly went missing. She was also accused of failing in her responsibilities generally as the Head of the Reception in relation to documentation of guests. She denied responsibility in relation to the incident of 21/7/2013 because she neither saw nor dealt with the guests who were received at night by guards. According to her she tried to call the guests to the reception with the help of the House keeper but the guests refused to be disturbed. She denied any wrong doing in as far as managing the reception is concerned and contended that the police never questioned her on 27/7/2013 about the alleged suspicious guests. She also maintained that she was not heard before the dismissal.
31. After considering the evidence by the claimants, the court is satisfied that the two claimants have on a balance of probability proved that they were unfairly terminated and the burden is now shifted to the defence to discharge the employers burden under Section 45 of the Act. The burden is simply to prove that the summary dismissal of the claimants was fair both substantially and procedurally.
32. The defence witnesses accused the 1st claimant for failing to receipt the ksh.9000 from 21/7/2013 to 24/7/2013 and for failing to notify the management. In addition they accused him of wrongfully receipting the money on 24/7/2013 in a new Receipt Book while there was another book which had not been filled up. The second claimant was accused by the defence witnesses of failing to keep proper documentation of all the guests in the hotel. RW2 and RW1 however contradicted on the date when CW2 registered suspicious looking guests and failed to take copies of their identification documents. According to RW1 the date was 27/7/2013 while RW2 said that it was on 25/7/2013. As regards fair hearing, RW1 said that he called the claimants to explain their case on 25/7/2013 in a meeting attended by the HRM and the then GM.
33. After carefully considering the defence evidence, the court is satisfied that the respondent had discharged the burden of justifying the grounds for dismissing the claimants. The court is satisfied that although the 1st claimant did his best to push the 2nd claimant to give him the particulars of the guests who used Room 15 on the night of 20/7/2013, he failed to notify the hotel management of his inability to receipt the money. Instead he allegedly kept the money in the safe for more than 2 days without notifying his seniors for directions. In that case he arrogated the discretion to keep the money without recording it any where or notifying the respondent. In addition the respondent believed that it was an act of dishonest on CW1's part to open a new receipt book for purposes of recording one transaction when another receipt book was still running. Even if he had the authority to open receipt books, this time round the employer was entitled to conclude, as he did, that CW1 had improperly performed his duty and dismiss him summarily.
34. In the same manner, the employer had the right to dismiss the second claimant for improper performance of duty. She was bound to manage the reception generally to the satisfaction of the employer. When the guests refused to be disturbed on 21/7/2013 and continued to use the room without formal check in and, after the time for check out passed, CW2 should have reported to the management. She however did not notify the respondent to help her get the particulars of the guests despite the pressure exerted on her by the 1st claimant. Even after the guests disappeared, she never reported the matter to the management until she was questioned on 25/7/2013. She admitted that on 9/7/2013 she was served with a warning letter for mishandling international bookings at her department. Even if the defence failed to connect CW2 with failure to take copies of passports and to register suspicious looking guests on 27/7/2013, the court is satisfied that the employer had a valid reason under Section 44(4) (c) of the Act to warrant summary dismissal of the 2nd claimant.
35. Section 43(2) of the Act defines the reasons for termination of employment as

“the matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

Without any doubt, the foregoing provisions renders the standard of proving the reason for termination a subjective test. It is all about what the employer personally and genuinely makes out of the conduct of the employee. The standard of proof is therefore not the objective test of “reasonable employer”. Even if another employer would not have dismissed the claimants for their conduct, it does not matter here. What matters is that the employer in this case considered the conduct of the claimants as gross misconduct which could not be tolerated in his business operations. According to her the said misconduct was posing security threat and breach of the law.

36. As regards procedural fairness, the relevant law is Section 41 of the Act. The said provision bars employers from dismissing employees under Section 44 of the Act for gross misconduct, physical incapacity and poor performance without first according the employee an opportunity to defend himself. The said provision is couched in mandatory terms and entitles the accused employees to an oral hearing in a language he understands, and in the presence of a shop floor union official or another employee of his choice. The procedure under the said section requires the employer to explain the reason for intended dismissal and thereafter invite the accused employee and his companion to air their defence. Thereafter the employer can make his decision whether to dismiss or not after considering the defence made by the employee and his companion. That obligation to conduct a disciplinary hearing or inquiry before dismissing any employee means that the employer's right under Section 44 *supra*, is subject to due process under Section 41 of the Act.
37. In this case, the defence did not adduce any evidence to prove that such an elaborate process was followed. Although RW1 said that he called the claimants to give the version of their story about the guests who were received by RW2 on 20/7/2013 at night, no evidence was adduced to prove that such a hearing took place. He did not also prove the capacity in which he called the alleged meeting. Even if such a hearing was convened, which has not been proved, there is no evidence to prove that it was in the context of the provisions of Section 41 *supra*.
38. Considering the evidence of the CW1, CW2 and RW2, RW1 did not feature in the process of dismissing the claimants. The only officials of the respondent involved were the HRM, Madam Rehema and the then GM Madam Emily who questioned the two claimants separately on 25/7/2013 after 4pm. According to the evidence adduced by the two sides the said questioning did not amount to a fair hearing within the meaning of Section 41 *supra*. The claimants like the RW2 were only asked about the money that was paid by guests who reported to the hotel on 20/7/2013 at night. They were not alerted that they were attending a disciplinary hearing and asked to be accompanied by a union representative or another employee of their choice. They were not alerted that the employer was contemplating to dismiss them on ground of the manner in which they handled the money and/or the records from the said guests. Consequently the court finds and holds that the said questioning of the claimants on 25/7/2013 by the HRM and the GM did not amount to a fair hearing and it fell short of the requirements of Section 41 and 45 of the Act and as such the summary dismissal of the claimants was rendered unfair. In addition the conciliation proceedings after dismissal could not cure the procedural unfairness in the dismissal because Section 41 and 45 *supra* requires that a fair hearing should precede the dismissal and not vice-versa.

RELIEFS

39. In view of the observations and findings above, the court makes a finding that the summary dismissal of the claimants was unfair and they are entitled to separation benefits plus compensation under Section 49 of the Employment Act. The prayer for reinstatement is however not allowed because that would amount to breaching the cardinal principle of freedom of contract. The two claimants will therefore get salary in lieu of notice, service charge due, leave days outstanding at the time of dismissal, salary underpayment plus 6 months salary for unfair dismissal.
40. The pay in lieu of notice is 2 months and 3 months for 1st and 2nd claimants respectively because the CBA provided for 2 months notice for workers who served less than 5 years and 3 months notice for those who served over 5 years. Salary underpayment has been assessed using the

difference between the actual pay and the amount provided for under the CBA multiplied by the number of the months of such payment. The award of 6 months salary as compensation for unfair dismissal instead of the maximum award is on the reasoning that despite the claimants being senior officers in the hotel, they also contributed to their dismissal. The rest of the awards are based on admission, CBA and the law.

41. The award for each claimant is summarized below. Under the CBA the claimants were both in Job Grade 8 Area B. their basic salary was ksh.19000+10% (shs.20900) from 1/7/2012 and ksh.20900+11%(Ksh.23199) from 1/7/2013. Their house allowance was ksh.6130 from 1/7/2013 and ksh.6804 from 1/7/2013. A simple calculation shows their gross salary as Ksh.27030 from 1/7/2012 and ksh.30,003 from 1/7/2013.

ROBERT KENGA

a. 2 months notice	60,003
b. service charge	18,560
c. leave travelling allowance	4,550
d. leave balance	2,294
e. salary underpayment 1/7/2012 -	
30/6/2013 (ksh.27032-25930).....	13,224
1/7/2013-29/7/2013 (ksh.30003-25910).....	4,074
f. compensation for unfair dismissal (ksh.30003x6).	<u>180,018</u>
	<u>282,722</u>

LILIAN WEDDAH

a. 3 months notice	90,009
b. service charge	18,560
c. leave travelling allowance	4,608
d. 4.3 pro-rata leave days	3,350.96
e. underpayment	
1/7/2012-30/6/2013	13,224
1/7/2013 – 29/7/2013	4,074
f. compensation for unfair dismissal	<u>180,018</u>
	<u>313,843.95</u>

45 The prayer for gratuity has not been proved by 2nd claimant and it is hereby dismissed. The prayer for general damages by both claimants is also dismissed for lack of merits. The claimants will however get certificate of service as prescribed under Section 51(2) of the Employment Act. The said provisions is coined in mandatory terms thus:

“(2) A certificate of service issued under sub section (1) shall contain:-

- (a) the name of the employer and his postal address;**
- (b) the name of the employee;**
- (c) the date when employment of the employee commenced;**

- (d) *the nature and usual place of employment of the employee;*
- (e) *the date when the employment of the employee ceased; and*
- (f) *such other particulars as may be prescribed”.*

The court has taken the trouble of duplicating the said provision verbatim after perusing the “certificate of service” drawn by the respondent on 29/7/2013. An excerpt from the same reads:-

“on 1st November 2010, he was promoted to the position of Head Cashier a position he held until the dismissal of his services on 29th July 2013”.

With due respect the said sentence in the 'certificate of service’ is in breach of a mandatory statutory provision. The parliament in its wisdom did not give employers the luxury of citing the nature or manner in which the employee's employment ended. It is obvious that if allowed employers could act in bad faith and ruin their former employees career by issuing certificates of service with negative comments. Consequently the respondent is hereby directed to forthwith issue the two claimants with proper certificate of service as prescribed by Section 51(2) of the Employment Act.

DISPOSITION

For the reasons and findings made above, judgment is entered for the claimants in the aggregate sum of **ksh.596,565.95** plus costs and interest from date of filing this suit.

The claimants will also have certificate of service as directed above.

Orders accordingly.

Dated, signed and delivered this 13th March 2015.

O. N. Makau

Judge