



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 866 OF 2013

REUBEN IKATWA..... 1ST CLAIMANT
ANTHONY WACHIURI WANDIU.....2ND CLAIMANT
BENJAMIN MUKUL.....3RD CLAIMANT
BERNARD NDICHU.....4TH CLAIMANT
EARNEST MWANGI NDIRANGU.....5TH CLAIMANT
GEOFFREY KARIUKI MUTHEE.....6TH CLAIMANT
ISAAC MBURU MBUGUA.....7TH CLAIMANT
ISAAC MUGI.....8TH CLAIMANT
JAMES GICHANE.....9TH CLAIMANT
JOHN NGIGI NDICHU.....10TH CLAIMANT
JOSEPH KARIUKI GATITI.....11TH CLAIMANT
MALIK KIURA NJOGU.....12TH CLAIMANT
MARTIN MUTINDA MUSYOKI.....13TH CLAIMANT
MESHACK NDIRANGU.....14TH CLAIMANT
PATRICK WACHIRA MATHENGE.....15TH CLAIMANT
RAMZAN KAKA.....16TH CLAIMANT
RICHARD KALUI.....17TH CLAIMANT
RICHARD YEGON.....18TH CLAIMANT

VERSUS

THE COMMANDING OFFICER BRITISH

ARMY TRAINING UNIT KENYA.....1ST RESPONDENT

JUDGEMENT

1. The Claimants filed their suit on 7th June 2013. In their suit the 18 Claimants sought resolution of the dispute they framed as the unlawful/wrongful dismissal and termination of services of the Claimants. They sued the Commanding Officer British Army Training Unit Kenya (BATUK) and averred that they were Locally Engaged Civilians (LECs) as drivers and mechanics in Nairobi Kifaru Barracks within Kahawa Garrison managed by the Respondent's military officers and others in Nanyuki Camp and Archers Post Training Camp, Isiolo, Samburu. They averred that they were employed on indefinite contracts and their terms were guided by the British Army Training Unit Kenya Standing Orders and Regulations issued by BATUK. The Claimants averred that they served BATUK for periods ranging from 3 years to 15 years. The Claimants averred that the Respondent is guided by the Memorandum of Understanding between the British government and the Kenya government entered into after independence for Kenya to offer training facilities to the British Army in the areas cited hereinabove. The Claimants averred that the Respondent's officers are on regular tour of training in Kenya and that the Respondent regularly received British Army officers for training drills in Kenya with support of the LECs. The Claimants averred that the Respondent's employment manual respects and is tailored to respect and be governed by Kenya Labour Laws as well as British Labour Laws and that the Standing Order of BATUK read together with the Regulations document provides that the Commanding Officer BATUK is the legal authority for the employment, dismissal and administration of civil labour resources and is also the legal employer of the LECs and has the appropriate delegated financial authority. The Claimants averred that they were employed as drivers/mechanics on various dates in the years between 1998 and 2010 and their respective letters of appointment/contract prescribed the offer of employment annual and monthly services, hours of work, overtime annual leave/public holidays entitlement, places of work, sick leave, notice of termination of services and how changes of terms and conditions of service and policy would occur and communicated. The Claimants averred that in the course of duty with the Respondent they had occasion to be subjected to performance appraisals in accordance with the standing orders paragraph 140 - 141. The Claimants averred that in accordance with annexure D1.D2 to BATUK Standing Order 103 dated February 2009, the Claimants were entitled to subsistence allowances and claims to enable them undertake official duties outside their normal places of work. The form had to be authorized, checked and was signed by the person making the claim and the BATUK's officers. The Claimants averred that in accordance with Standing Order annexure 2.3 the Respondent provided guidance on LECs allowances detailing amounts on night subsistence, feed but not accommodated, accommodated but not fed, day subsistence over 10 hours, day subsistence over 5 hours, accommodated and fed and the requirements of the Respondent's officers who were authorized to sign off those allowances. The Claimants averred that in accordance with Standing Order annexure D.4 the Respondent attached a form for the Claimants for application for an advance of LECs subsistence allowances with part one - request for allowance, part two - authorization, part three - signature of LEC officer making undertaking. The allowances for LECs were revised and the new rates posted on a notice board accessible to all LECs. The Claimants averred that as required they filled subsistence forms provided by the Respondent in the years of engagement but in 2012 and 2013 issues were raised by the Respondent. The Claimants averred that on 10th May 2012 they authored a comprehensive petition to the Respondent raising various complaints against Major Strudwick Deputy Commanding Officer Support, the second in command in the Respondents organization. The Respondent replied to the petition on 24th October 2014 dismissing the contents of the petition and directed his wrath on the LEC Works Council and stated that where he ruled that a grievance was not warranted, he did not expect it to be raised again and expected the Works Council assurance on this prior to an event being scheduled. The Claimants averred that after the rejection of the petition and before the 'imprest' stamp was mysteriously introduced the LECs were addressed by Maj. Strudwick on the issue of the impending redundancies that would affect them. The Claimants averred that the person they had petitioned to be removed from administration and command of LECs came up with letters dated 12th February 2013 addressed to 46 LECs on charges of knowingly having submitted fraudulent claims as unearthed by a recent financial audit in respect of subsistence claims. The letter attached to the investigating hearing a programme detailing date and time each LEC accused would attend the investigatory hearing. The LECs wrote back on 18th February 2013 to the Respondent declining to attend the investigation hearing individually. The Claimants averred that the Respondent through Major Farrington a Civil Labour Officer on a short visit to BATUK from UK, wrote that failure to attend the investigatory hearings would result in disciplinary action being taken against them for refusal to carry out management directions and that it constituted gross misconduct which if proven under UK and Kenyan laws would result in their summary dismissal. The Claimants averred that following the standoff between the LECs and the Respondent the entire 200 LECs marched out of camp on 26th February 2013 and marched to the Laikipia County Labour offices to present their grievances against the Respondent alleging attempts to lay off their colleagues on the basis of the 'fraudulent claims'. The Claimants averred that the Laikipia County Labour officer summoned the officers of the Respondent and after a lengthy discussion with them on one side and the representation of the Works Council, the Labour officer advised that the subsistence allowances are not accountable like imprest and as such the Respondent had no case against the suspected employees for fraudulent claims but the Respondent insisted that conclusive investigations must be undertaken or else the Respondent would be investigated by the seniors in UK. The Claimants averred that after the meeting at the Labour Office the Respondent through Major Strudwick wrote another letter dated 7th March 2013 asking 46 LECs including the 18 Claimants to appear before a disciplinary hearing and not an investigatory hearing at Nairobi on 12th March 2013. The Claimants averred that on 8th March 2013 another letter was issued by Major Strudwick requiring the Claimants to attend the disciplinary hearing at Nairobi in which question of disciplinary action against the Claimants would be considered on allegations of submission of false claim for subsistence. The Claimants averred that the Chairman of the Works Council - the 1st Claimant as he tendered his resignation on 1st March 2013 apologized for the walkout to the Labour office by the LECS but the DCOS replied on 5th March 2013 emphasizing that he would not tolerate fraud, corruption, theft and abuse. The Claimants averred that while the disciplinary meetings took place from 12th to 18th March 2013 the Respondent immediately on 20th March issued the 18 Claimants with a letter of termination of contract by way of summary dismissal with forfeiture of gratuity on account of gross misconduct as per Standing Order 103 paragraph 46 a. The Claimants averred that all the suspects received had received their Certificates of Service dated 21st March 2013 even when some of the staff were heard on 18th March 2013 and the last on 25th March 2013 which demonstrated that the disciplinary measures had been concluded long before the hearing. The Claimants averred that they appealed against the dismissals and filed grounds of appeal before 5th April 2013 and the Respondent acknowledged the appeals against summary dismissal from the Claimants. On 23rd April the Respondent wrote to the Claimants confirming the dismissals effective 18th March 2013. The Claimants averred that they were placed in a position of renegeing on payment of various loans with different lending institutions which predicament could only be blamed on the unlawful and wrongful summary dismissals by the Respondent. The Claimants sought that the Court finds that the Respondent cannot be a complainant, prosecutor and judge in their own case as the issues of fraud are best dealt with by a court of law. The Claimants prayed for orders for accrued benefits and underpayment for the Claimants, one month's pay in lieu of notice, accrued gratuity, compensation at 12 months salary for unlawful/wrongful dismissal, lost earnings from date of dismissal to date of award, exemplary and punitive damages for unlawful dismissal, interest and any other relief the Court may deem necessary and just in the interests of justice.

2. The Respondent filed a Response and Counterclaim on 1st July 2013. In the response and counterclaim, the Respondent averred that Isaac Mburu Mbugua, James Gichane and Meschack Ndirangu were employed as mechanics while the rest of the Claimants were employed as drivers and that none of the Claimants were employed as drivers and mechanics. The Respondent averred that it entered into individual contracts of employment of with each of the Claimants. The Respondent averred that there is only one named Respondent, the Commanding Officer of BATUK and denied any knowledge of a memorandum of understanding between the British government and the Kenya government but is aware of a memorandum of understanding between the Government of the Republic of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland. The Respondent averred that the British army soldiers who train at BATUK are not the Respondent's officers but rather those of the Ministry of Defence of United Kingdom. The Respondents denied that the Claimants were employed by the 1st Respondent and that BATUK did not apply British labour laws in its employment manuals. The Respondents averred that the appraisal forms annexed by the Claimants were not the only appraisals undertaken by BATUK during the Claimants course of employment as each Claimant was appraised every year and an appraisal form duly filled. The Respondents averred that the 2007 pay review at point 12 provided that the LECs could claim the entire advance for subsistence and that BATUK raised queries in the period 2012 to 2013 concerning subsistence claims put forward by 46 of its employees including the Claimants herein and that payment had been made on some of the claims. The Respondents averred that in the course of an internal audit at BATUK, it was discovered that the subsistence claims put forth by the 46 employees including the Claimants herein, appeared irregular. The receipts in question were alleged to have been issued by Upways Investment Limited and a close scrutiny of the receipts submitted compared with other receipts surrendered by other employees, it appeared the receipts given by the 46 employees including the Claimants appeared not to be genuine receipts issued by Upways Hotel. It was averred that enquiries by BATUK at Upways Hotel further confirmed BATUK's suspicions concerning the receipts. The Claimants were invited to an investigatory hearing to allow for BATUK to get clarification on the claims that appeared to be irregular and BATUK sought clarification in respect of the subsistence claims for Anthony Wachiuri Kshs. 4,000/-, Benjamin Mukui Kshs. 4,000/-, Bernard Ndichu Kshs. 8,000/-, Ernest Mwangi Kshs. 25,000/-, Godfrey Kariuki Kshs. 63,000/-, Isaac Mburu Kshs. 48,000/-, Isaac Mugi Kshs. 16,000/-, James Gichane Kshs. 23,000/-, James Ngige Kshs. 53,000/-, Joseph Kariuki Kshs. 20,000/-, Malik Kiura Kshs. 14,000/-, Martin Musyoka Kshs. 33,000/-, Meshack Ndirangu Kshs. 48,000/-, Patrick Wachira Kshs. 3,000/-, Ramza Kaka Kshs. 8,000/-, Reuben Ikatwa Kshs. 8,000/-, Richard Kalui Kshs. 4,000/-, Richard Yegon Kshs. 20,000/-. It was averred that BATUK received a petition dated 10th May 2012 signed by Reuben Ikatwa on behalf of the Works Council of BATUK seeking the removal of Major Strudwick and that BATUK engaged the staff in several meetings after receipt of the petition and a letter dated 24th October 2012 was written giving BATUK's position on the matter and that by letters dated 12th February 2013 BATUK invited the Claimants to provide explanations of what appeared to be irregular subsistence claims and a programme of the hearings was provided. The Respondents admitted that the Claimants and a number of their colleagues marched to the Laikipia County Labour office on 26th February 2012 and that the walkout was intended to frustrate BATUK's investigations into the irregular subsistence claims. It was averred that the walkout on 26th February 2013 was illegal and done without notice to either BATUK or the Respondent and without any permission from either of them and in order to try and facilitate the return to work of the employees and in good faith the 1st Respondent visited the Laikipia Labour Office. The Respondent admitted that Major Strudwick on behalf of BATUK wrote letters dated 7th and 8th March 2013 inviting 46 employees including the Claimants to a disciplinary hearing and that none of the 46 employees attended the meeting. It was averred that the letter of 7th March was the explanatory notice provided for under Section 42(1) of the Employment Act and the letter of 8th March 2013 was the notice of the disciplinary hearing provided for under Section 42(2) of the Employment Act. The 2nd Respondent BATUK received the letter of 1st March 2013 from Reuben Ikatwa which he *inter alia* resigned from the Chairmanship of the Works Council and BATUK responded by its letter of 5th March 2013. By letters of 12th February 2013 the 46 employees including each of the Claimants was invited to an investigatory hearing to allow BATUK clarify some discrepancies in the subsistence claims and each of the 46 employees defied the request to attend the investigatory hearing scheduled on 21st February 2013. As a result of the refusal and the mass walkout by the Claimants BATUK gave an explanation pursuant to Section 42(1) why it was considering terminating their employment and each of the 46 employees including the Claimants was then invited to a disciplinary hearing and that this was in accordance with Section 42(2) of the Employment Act. It was averred that a disciplinary hearing was held and each of the Claimants was dismissed on account of gross misconduct. The Claimants appealed their dismissals as provided for in BATUK's internal regulations for LECs and the appeals were duly considered and decision to summarily dismiss them was upheld. The Respondents denied having being party to or having any knowledge of the Claimants loan agreements with third parties or third party lending institutions.

3. The Respondents in counter-claim sought the sums fraudulently claimed for subsistence allowance by each of the Claimants being as follows: - Anthony Wachiuri Kshs. 4,000/-, Benjamin Mukui Kshs. 4,000/-, Bernard Ndichu Kshs. 8,000/-, Ernest Mwangi Kshs. 25,000/-, Godfrey Kariuki Kshs. 63,000/-, Isaac Mburu Kshs. 48,000/-, Isaac Mugi 16,000/-, James Gichane Kshs. 23,000/-, James Ngige Kshs. 53,000/-, Joseph Kariuki Kshs. 20,000/-, Malik Kiura Kshs. 14,000/-, Martin Musyoka Kshs. 33,000/-, Meshack Ndirangu Kshs. 48,000/-, Patrick Wachira Kshs. 3,000/-, Ramza Kaka Kshs. 8,000/-, Reuben Ikatwa Kshs. 8,000/-, Richard Kalui Kshs. 4,000/-, and Richard Yegon Kshs. 20,000/-. The Respondents thus prayed the Claimants claim be dismissed with costs and judgment be entered for the Respondents against each of the Claimants as set out above.

4. The Claimants on 5th December 2013 filed an amended Memorandum of Claim to include the 2nd Respondent the British Army Training Unit Kenya (BATUK). In the amended claim the Claimants averred that there was no provision for investigatory hearing in the Terms and Conditions of Service pertaining to the LECs in the 2nd Respondent's Standing Order no. 103 and the Regulations. The Claimants averred that there was no incitement by the Works Council to industrial unrest and that the walkout by LECs was spontaneous and was provoked by the Respondent's spurious accusations at a morning parade on 26th February 2013 and that the walkout was by over 260 LECs and the Claimants wondered why a few were picked on for punishment. The Claimants averred that the return to work formula hammered out at the Laikipia County Labour offices was that there would be no victimization. There was no defence filed against the Respondents' counterclaim nor was there an amended defence and counterclaim filed.

5. The Claimant filed a list of witness statements by each of the Claimants on 27th February 2014, the Respondent filed a supplementary bundle of documents on 26th February 2014 and a witness statement by Major Farrington on 21st March 2014. The Claimants also filed supplementary authority on 29th October 2013 to include the Memorandum of Understanding on defence cooperation between the governments of Kenya and the Kingdom of Great Britain and Northern Ireland and also filed a supplementary bundle of documents on 20th November 2014 to include the letters from the Laikipia County Labour Office and the 2nd Respondent in relation to the walkout and summary dismissals.

6. The Claimants each testified with the 1st Claimant taking the stand on 1st April 2014. He was led in his examination in chief by the counsel for Claimants Mr. Kubai. The 1st Claimant testified in greater detail as he was the works council chairman at the material time and his testimony was that he was unfairly dismissed for seeking to defend that the Respondents follow the procedures in the Terms and Conditions of Service and the Regulations and Labour laws. He testified that the LECs were concerned by the highhandedness of the second in command to the 1st Respondent a Major Strudwick and sought his removal. The 2nd Respondent declined to remove Maj. Strudwick leading to tension. He testified that he was accused of knowingly having submitted a fraudulent claim to the tune of Kshs. 6,000/- and was invited to attend a disciplinary meeting. He stated that the LECs had submitted forms for subsistence allowance plus receipts from Upways Hotel and that there was no provision for an investigatory hearing in the terms and condition of service. He testified that after the issue of the illegality of the investigatory hearing was raised, Major Farrington wrote back on behalf of the 2nd Respondent and advised that failure to attend the hearing would result in disciplinary action being taken. As the 1st Respondent was not in camp Major Strudwick addressed a parade on the morning of 26th February 2013 where he gave stern orders to the parade attendees who were the entire compliment of LECs. He testified that Major Strudwick advised the LECs that he would punish them if they did not comply with orders of management and that the LECs were not happy with the tone and manner of address and decided to seek help from the District Labour Office at Nanyuki. He testified that the group on arrival at the Labour Office met Mr. Ben Maota who was the County Labour Officer and asked the LECs to append their signatures on a paper. The Labour Officer called the 2nd Respondents representatives and the 1st Respondent, Col. Christie, Majors Monihan and Farrington appeared. He testified that a group of LECs and Works Council members were selected to attend the discussion on behalf of their colleagues and the employees returned to camp peacefully. He testified that the issue of receipts and subsistence allowance was raised and the Labour Officer insisted that subsistence allowance was not an accountable allowance but the management of 2nd Respondent insisted that it had introduced a system of receipts. He testified that the Labour Officer advised that if fraud was committed the Respondents should involve the police and asked that the Respondents continue with investigations and cautioned against victimization. He testified that the 1st Respondent was present when the Labour Officer addressed a grand parade at the 2nd Respondents camp in Nanyuki and indicated that the matter of subsistence allowances had been discussed and that there was to be no victimization. He stated that afterwards the Claimants received letters inviting them to a disciplinary meeting and that the letter was signed by Major Strudwick whom they had petitioned for removal. He testified that his letter was for an alleged fraudulent claim for 8,000/- and that he was entitled to be accompanied by a member of the works council or staff member of his choice. He testified that he was charged with submission of a false claim with intent to defraud, inciting LECs to disregard management instructions regarding compulsory attendance to investigatory hearings, failing to attend investigatory hearings contrary to managements directive, inciting LECs industrial action, convening an unapproved Works Council (WC) meeting and inciting industrial unrest. He stated that WC meetings did not require permission and it was permissible for WC to meet during working hours. He denied inciting industrial action or unrest. He testified that he was given two different letters with two different charges - 2 versus 6 with different amounts. He testified that he did not hesitate to attend as did the other 17 and that he was accompanied by a colleague who sat through the meeting bit did not speak and that the meeting had Major Strudwick as prosecutor and an invited officer who was the judge and there was a female officer who took notes and record of the proceedings. He responded to the charges against him and stated that he got the receipt for subsistence from Upways Hotel which is along Thika Road opposite Kenya Breweries and near Roasters. He testified that he paid for his accommodation at Upways Hotel and was given a receipt at reception for 2 nights. He stated that at the money for the travel to Nairobi was subsistence, allowance and this was never changed to imprest. He testified that the form for subsistence allowance was changed in 2007 after the review and the form now provided for attachment of receipts. He testified that the hearing was concluded the same day and he was advised that he had been dismissed. He was asked to give his ID documents, and card and Major Farrington gave him fare to return to Nanyuki and was marched out by a security officer. He testified that during the hearing he was given a verbal dismissal and was given the letter of dismissal on 20th March 2013. He testified that the procedure was not followed and that the disciplinary procedure was improper and the findings were not sent to the Head Quarters Land Welfare Centre for Belize and Kenya (based in UK) for a decision as to whether forfeiture of gratuity was appropriate. He stated that only the Quarter Master or the 1st Respondent could serve an instant dismissal. He testified that for fraud cases the police must be involved and that the police were not involved in his case. He testified that the lady taking the record said he had to sign it but he was not given the record to sign.

7. In cross examination by Miss Kashindi, he testified that his appeal letter was signed by the 1st Respondent. He agreed that Major Strudwick was second in command and was not removed and that to his knowledge Maj. Strudwick was not found guilty of any wrongdoing as per the letter by the 1st Respondent in response to his petition to remove Maj. Strudwick. He testified that the LECs stated through works council that they would not attend the investigatory meeting. He stated that the mass exit from Nanyuki camp was not a strike. He conceded that the form for subsistence allowance was changed and the LECs had to attach receipts. He testified that it was a management decision to demand receipts for subsistence allowance and that it was not akin to imprest where receipts were required to account. He testified that he was invited to investigatory hearing and he gave notice he would not attend and he was subsequently invited for a disciplinary hearing and he attended, was heard and was dismissed. He was advised he could appeal and he appealed and his appeal was also dismissed. He testified that he was asked by the lady taking minutes to sign. He stated that in terms of the conditions of service the report must include the hearing officer's conclusions and recommendations. He denied arm twisting the 1st Respondent to drop the investigations and testified that in all his years as member of the WC he had never attended an investigatory hearing and that BATUK was wrong to carry one out. He stated that BATUK had declared him a fraudster but admitted that there had been no communication with third parties.

8. In re-exam by Mr. Kubai, he testified that the LECs were entitled to walkout or strike according to Kenyan employment law. He stated that the title of the claim form did not change and that it still read claim for subsistence allowance. He testified that prior to dismissal he was to be given 10 days and another 10 days for the head of department to make decision and that was not followed.

9. The second witness called was Martin Mutinda Musyoka the 3rd Claimant. He testified that he was employed in 2008 and was a driver/maintenance. He testified that he was charged with fraudulently obtaining Kshs. 32,000/-. He stated that he used to stay at Upways Hotel and received the receipt from Upways Hotel. He admitted he did not attend the investigatory hearing. He testified that his disciplinary hearing was scheduled for 15th March 2013 and that on that day his hearing did not proceed as he was taken to the hotel by Maj. Farrington to verify the receipts and that they found the director of the hotel. He was asked to leave the room and after some time was taken to the police station where they met the District Criminal Investigations Officer (DCIO) who asked him a few questions. He testified that he was asked to record a statement on 16th March 2013 which he did. He stated that he went for the disciplinary meeting on Monday at BATUK's Kifaru Camp at Kahawa Garrison. He stated that he was sacked before the hearing by the judge presiding and that Maj. Strudwick the prosecutor asked him where he had slept and that Maj. Strudwick had no problem with his work. He testified that Maj. Farrington is the one who gave him fare to return to Nanyuki as a sacked officer is not allowed in the 2nd Respondent's vehicles. He testified that according to the terms and

conditions of service he was to read what had been written and have 10 days within which to sign. He testified that the letter of termination was given on 20th March 2013 stating that his last day of service was 18th March. He testified that he continued to attend the Police station and the investigating officer a Corporal Chege told him that a letter had been sent to BATUK and that his investigation had concluded that the receptionist at the hotel was the problem. He appealed and his appeal was dismissed. He sought notice and gratuity and claimed the Respondents had smeared his name and that he cannot get any other job.

10. In cross examination by Miss Kashindi he testified that there was receipt he was issued which was from the receipt book and that there were receipts from the book and there were more receipts which did not come from the book and one could not differentiate without seeing the original. He testified that some of his receipts were for 4,200/- but he could only claim 4,000/- and that he only claimed 4,000/-. He stated that he stayed at Upways Hotel on all the material dates. He testified that there was gratuity payable if one had worked for 5 years and he admitted he had only worked for 4 ½ years for the 2nd Respondent.

11. In re-exam by Mr. Kubai, he testified that he had several receipts and that the Respondents only used one and the others were not compared. He testified that he would not know if the receipts were genuine and that he got all the 8 receipts from the hotel and that he was not entitled to gratuity as he had not served for over 5 years.

12. The third witness for the Claimants was Benjamin Mwangi Mukui who is the 3rd Claimant herein. He testified that he worked for the 2nd Respondent for 9 years as a driver. He testified that he slept at Upways Hotel and submitted the receipts for the night outs. He stated that he could not tell the genuine and fake receipts. He testified that he would take the room for 4,200/- and top up so that he finishes the money allocated to him by BATUK for night out. He confirmed he did not attend the investigatory hearing and that he was charged with failing to attend investigatory hearing and the submission of a false claim. He testified that he attended the disciplinary hearing on 18th March 2013 and that he was accompanied by a colleague of his choice. He stated that he was called in and Maj. Strudwick who was the officer they had petitioned for removal was present. He testified that when he went in, the officers present introduced themselves and they threatened him and told him that his predecessors had all been sacked and that he should just tell them the truth. He was then asked to go out briefly for a minute or two and when he returned he was asked if he was in agreement and if one was not in agreement they sacked you there and then and given 500/- to travel to Nanyuki. He testified that he received his letter after 2 days and that it was signed by Maj. Strudwick and that it should have been signed by the 1st Respondent. He testified that he appealed against the dismissal and the termination was upheld. He asked the Court to consider he was wrongfully dismissed from work and the Court should order that he be paid all the dues for someone who was wrongfully dismissed. He testified that he was not paid gratuity and was not paid the salary for that month. He thus sought in addition to that, notice and damages.

13. In cross examination by Miss Kashindi he testified that he was aware that one must attach receipts to the claim form though this requirement came later. He testified that it was not correct that one could spend less than the 4,000/- allocated as it was a fixed sum. He stated he went to the hotel because he had to use all the cash. He testified that the letter from Works Council (WC) was written for them and that they relied on the regulations for locally employed civilians (RELECs) which guided them. He denied that he had submitted a false claim and failed to attend an investigatory hearing. He stated he was sure the WC must have attended the meeting and that he got feedback from WC. He testified that he was scared and kept quiet and did not ask a question and that his representative was left outside the room. He testified that he brought not bought the receipt. He stated that the chair of the panel was a UK based independent officer.

14. In re-examination by Mr. Kubai, he testified that Maj. Strudwick was prosecuting and that the WC was representing them on the refusal to attend the investigatory hearing. He stated that he did not expect a verdict on each count and that he had 2 charges and these were not proved.

15. The next witness was Anthony Wachiuri Wandiu who testified that he joined BATUK in 1996 as a casual labourer and was given a contract in 2002. He testified that he worked for 17 years in both casual and permanent employment. He stated that he worked as a driver and was out on duty at times. He testified that he would make claims for subsistence allowance and that the money given was to be spent at the hotel. He stated that the subsistence form did not require receipts to be attached until later. He testified that the amount he spent at the hotel was 4,200/- and that he claimed 4,000/- and the 200/- was from his pocket. He stated that he was given a receipt by the lady at the reception and he could not tell if the receipt he received was genuine. He testified that he was involved in the mass walkout from the Nanyuki camp because of the grievances. He stated that he was called for the disciplinary hearing and that he was threatened that he would lose his job. He did not attend the investigatory hearing and instead the Works Council was to represent him and his colleagues at the investigatory hearing. He stated that he was summoned to a disciplinary hearing later and he attended and found three officers including Maj. Strudwick who was interrogating them. He attended in company of his colleague Macharia who did not participate. He testified that he was asked for his name and whether he spent a night at the hotel. He was then dismissed and that he was escorted to the gate by G4S and he did not sign the minutes. He stated that the Respondent was supposed to give him minutes for the proceedings and he had 10 days within which to respond and confirm the accuracy. He appealed the dismissal and the dismissal was confirmed. He testified that he sought payment of damages, compensation, notice and gratuity. He had worked for about 5 years but had not qualified for gratuity.

16. In cross-examination by Miss Kashindi, he testified that he did not have any problem with the increase of subsistence to 4,000/-. He stated that he did not raise any issue in regard to the attachment of receipts and was aware that by signing on the document he was confirming that the information there was correct. He stated he did not attend the investigatory hearing and the Works Council represented them. He testified that at the disciplinary hearing his colleague accompanied him but was not given a chance and was told to go out. He stated that he did not refuse to sign the minutes and that there was someone taking the minutes and that he was not allowed to ask questions.

17. The next witness was number 71489 Corporal Simon Chege based at CID Kasarani. He stated that he had served in the National Police for 18 years and in 11 of those years he was in CID and had undergone extensive training on investigations. He had a diploma and had also enrolled in a course of criminal investigations. He testified that he was familiar with the case before Court and that on 15th March 2013 Benson Njoroge, the proprietor of Upways Investments located at Thika Road accompanied by staff of British Army Training Unit based at Kahawa, came to the police station and Benson reported there was fraud going on in the hotel and was assigned duty by Chief Inspector Gitanga Deputy DCIO to investigate with his colleague Corporal Kadar. Before they were given names, they went to BATUK to request for more information as the alleged masterminds were said to be at Kahawa Barracks. They were given names of Martin Musyoka, Benson

Mangaine, George Kamau, John Wambugu and Isaac Mugi. Among the names given they were also given some documents for investigations and these were receipts purported to have been issued to the staff officers of BATUK. The receipts were accompanied by claim form for subsistence allowance. They requested the staff to be availed for recording of statements and further investigations. He testified that he was given the original copies of the receipts and claim forms. After collecting the documents they prepared acknowledgement and an inventory and the inventory included the documents we collected for investigations. He recorded statements from Martin Musyoka, Edwin Ndungu, a staff of British Army, Francis Musese the cashier at British Army and also went to the complainant Upways Hotel. They recorded statement of George Njoroge and found that there were other members of public who were complaining that they paid the receptionist money and were not given receipts. Among statements recorded were for Anthony Gitau a businessman who sold electronics and who had booked a room at the hotel. He testified that Mr. Njoroge named Monica the receptionist and another employee named as Harun were involved in the theft. He testified that they prepared a preliminary report and found that in the hotel, there was fraud concerning some receipts where the receipts were not from Upways. He indicated that the receptionist of Upways gave all the suspect receipts to the clients. His findings revealed that staff from BATUK were paying 4200/- and claimed 4,000 and this was the standard the employer was paying. Even if the hotel cost 4,200/- only 4,000/- was paid by employer. From investigations he established there was no false claim. All journeys were authorized by senior staff and the allowance paid. They were left only with an option of charging the Upway employees for offence of stealing by servant where they had initially shown the receipts themselves were not from the Upways Hotel itself. He produced the preliminary report which was marked Exhibit 1. According to the statement of the owner of the Hotel, the receipts from BATUK showed the word investment as spelt Invsetment instead of Investment. Though the serial number resembled the serial number in the correct books and were all issued by the employee of Upways Hotel, Monica. Other receipts were presented and yet were in series not used as per that date. After recording statement he requested for details of the employee and from the details given they could not trace her and they opened a case against the lady CR 123/159 2013 which is pending arrest of a known accused Monica Karuma who is being pursued. She can be physically identified by the employer and BATUK staff who spent the night there. He testified that he also recorded a statement from Musyoka and that Mr. Musyoka said that in June and July Musyoka was assigned duties from BATUK Nanyuki and was required to spend the night in Nairobi and decided to go to Upways hotel as most of the staff spent their night there. He testified that Musyoka stated he paid 4200/- full board for each night spent there and was issued with a receipt which was used to account or claim the money spent. After paying the sums due, Musyoka was given a receipt that was used to make the claim. Musyoka was to face a disciplinary panel at Kahawa Kifaru camp to answer allegations of fraudulent claims. He confirmed Musyoka slept at Upways and submitted Musyoka's statement as evidence before court which was produced and marked exhibit 3. He interviewed the chief cashier of BATUK Francis Lisese who stated the Subsistence allowance forms which were given as exhibits were duly authorized and signed by the officers. The Cashier made payment of 4,000 and not 4,200/= as indicated in the receipt as 4000/= was the standard to be paid. The receipt presented was for 4,200/= but the overstated amount on receipt being 200/= was not claimed for. He interviewed Edwin Warui Ndungu who is a Royal Military Liaison officer of BATUK and Edwin Warui stated he had spent 2 times at Upways on 25th 2012 and paid 4,200/- and was issued receipts on the 2 occasions by Harun. He testified that Edwin Warui stated he could identify the said Harun and denied making any fraudulent claim. He testified that he interviewed Antony Gitau Kiero a businessman who had booked the hotel on 2nd August for a guest from Dubai - a couple from Kenya and a South African. Gitau was served by a receptionist Monica who failed to issue a receipt after payment. The guests were booked for 7 days and paid 10,000/= and on demanding a receipt was issued with one receipt which was suspected not to be official. He testified that he was asked to record statements from other staff but the other BATUK officers Isaac Mugi and George Kamau did not record statements. According to complaint made by Benson Njoroge vide OB 87 of 15th March 2013, they established the employees - Monica Karuma and Harun were the masterminds of the scandal and the Police are yet to arrest them because Upways management has already chased them away and their whereabouts could not be established. He stated that this is a case pending at Kasarani Police Station and when seen they can be arrested and charged. He testified that he never recorded any other statement from BATUK officers who accompanied Mr. Njoroge and only recorded that of chief cashier. He produced his statement and the inventory.

18. In cross-examination by Miss Kashindi he testified that he understood that this is not a criminal trial and the complainant was Upways Hotel. He testified that the receipt book is with management of Upways and he did not retain it. The standardized rate was 4,000/- but the Upways hotel room was 4,200/- and that the employees of BATUK were issued receipts by the employees of Upways hotel. He confirmed he had seen response from BATUK and that Exhibit 1 was authored by Dorothy Kamunde of Kasarani Police station. He testified that he was not aware of the investigations and appeals by BATUK and was shown a letter that confirmed the dismissal of BATUK staff. He was referred to receipts and confirmed that the receipt at page 223 is for Martin Musyoka and that it was from Upways Invsetment which is misspelt and at page 117 of was a receipt for Isaac Mugi and the word investment is not correct. He confirmed that he did not investigate all the cases before Court. He did not contact anyone else other than Patrick in management of BATUK and that he did not know all the Claimants here. He testified that one cannot use criminal investigations for internal disciplinary processes as they are different.

19. In re-exam by Mr. Kubai, he testified that what he investigated were fraudulent claims and not by BATUK and he investigated fraud which is where somebody deceives either in forgery or obtained any material through misrepresentation. He stated that he had come across fraud at workplace and fraud is a criminal offence. Fraud is not a misdemeanor and attracts a custodial sentence.

20. The next witness was Bernard Ndichu Kabue who was employed by BATUK in 1999 and was dismissed on 18th March 2013. He worked as a driver/storeman and at time of dismissal was based at the store. When he travelled he would be allowed night outs and be given costs for night out for accommodation - Kshs. 4,000/-. Depending on where he would stay he spent it all at Upways Hotel. At times it would cost him more and he would top up. He was not required to give receipts prior to 2012 and from 2012 is when he brought his first receipt. He would fill a form for authorization, it was authorized and he would get money to spend or if the boss was absent he could spend his money and claim. He was accused of fraud on the matter and it was said he had not slept at Upways. The receipt was said to be bogus and he was given letter with charges. He testified he had 2 options - Works Council or send a colleague and he opted for Works Council. He did not appear as Works Council was to speak with management. Staff declined to appear after talks failed and they went on a strike. He stated that they went to Labour Office and when they went to DLO, Works Council went into office and Labour Officer called their bosses and it was agreed that they return to work as issue was being resolved. They returned to work and were told the cases would go on but in Nairobi. He testified he came to Nairobi and found the panel and he went with a colleague who represented him but did not speak and did not ask to speak. He had 2 charges, one for fraud and second charge was going on a strike. He explained how he came to Nairobi and stayed for 2 days at the hotel. The panel comprised of 3 staffers of BATUK and one of the panelists was a military policeman - he was the judge, there was a secretary and there was another one who had accused us of fraud. He testified that the person who accused them of fraud was the DCOS. The other person was Maj. Farrington who was in another office. Once you are sacked you are sent to Maj. Farrington who gave him fare for travel to Nanyuki. The sentence was given there and then. He did not see the transcript of proceedings or sign any documents on the proceedings. He testified that there is not impress at camp and that it was subsistence. He testified that the Respondent paid for his accommodation and that he shared a room with a colleague. He testified he was asked to return ID and uniform and that he gave back the items - shoes, ID and uniform

on the same day. He met and agreed with his colleagues who were dismissed to seek redress and wrote letter of appeal which was dismissed by Commander. He used to go to Quarter Master if they have problems and did not go to Commander. He testified that after service you get retirement or benefits and the retirements have a different name. He stated that one is paid one month for year of service and that he never got paid for the 14 years and was told if the dismissal was on fraud, he would not get paid. He sought payment of service and damages for dismissal without cause. He also stated he did not have a letter he can use to seek employment.

21. At the end of his cross-examination the court took a brief recess and on return noted the witness being coached on what to say by Reuben Ikatwa, the 1st Claimant and the Court thus excused the witness as he was not being honest in his testimony to Court.

22. The next witness for the Claimant was called. He was Mr. Isaac Mburu Mbugua. He testified that he was employed by British Army on 2nd February 2010 as a motor vehicle Electrician and his service was permanent. He used to maintain and service electrical equipment and accessories of the motor vehicles of Respondent and his duty required travel at sometimes. He claimed subsistence allowance when he went for a training course in July 2013 and claimed 48,000/- for 12 nights and that is what led to his dismissal. He testified that the management said he had submitted a false claim yet he slept out of station for 12 nights. He testified that he got a certificate on completion of course and that he was called before a panel on allegation that he had committed fraud. He did not go as Works Council represented him and that he was given an option to be represented or appear in person. He testified that he was later called for disciplinary hearing at Kahawa for not attending investigatory hearing which and the false claim. He was accompanied by colleague of his choice and in the room which was like a court, there was Maj. Strudwick who was the judge, the prosecutor and there was another judge who was said to be independent and there was a lady recording what was said. He testified that it was unfair and the case proceeded by questions which he answered to the judge who was neutral. He stated that it was wrong and after conclusion of hearing he was summarily dismissed. He was supposed to be given 10 days to go through the file and sign but he was dismissed on the spot. His representative was not allowed to speak. He stated that the form he filled was a subsistence allowance form. He was allowed to appeal in 5 days and he appealed and the commanding officer declined to allow his appeal. He stated that he was wrongly dismissed and decided to come to court to seek all his dues and benefits. He testified that he was defamed and that they had recognized his job but afterwards they defamed him and he would like to be paid for that to the fullest. He had worked for 3 years and was to be paid gratuity which is calculated as per years worked on the basis of salary of 1 month. He testified that the Police were called in but they did not investigate him. He stated that inside the court presided over by Maj. Strudwick, Maj Strudwick took out a phone and threatened to call the police and when he was leaving met the police. When police came he had already been summarily dismissed and he was still looking for a job and seeks gratuity which was not paid.

23. The cross-examination by Miss Kashindi elicited responses from him as follows. He testified that he knew what defamation was and that he was defamed. He stated that he was assigned a task and after doing it he returned to his station and claimed what was rightfully his and was told he was a fraudster. He did not know if anyone else was told this. It was his first time to go out and receive subsistence. He was shown the subsistence form he had filled and confirmed that it was the claim he had submitted to BATUK. He testified that it provided that he must attach receipts and that he signed the form. He confirmed that he slept at Upways Hotel and stated that his names are Isaac Mburu not Isaac Mugi. He did not object to attaching the receipt. He testified he was invited to an investigatory hearing through letter dated 12th February 2013. He did not attend as the Works Council was to represent him. The Works Council wrote a letter but they never gave him a copy. He did not know if they said the employee will attend. He testified that Maj. Farrington announced at parade that the employer was working on the matter. He stated that he was not aware of the contents but believed they got the letter and that the Works Council is the only one that can confirm if it attended the hearing on his behalf. He confirmed that he was dismissed on 19th and the date on dismissal letter was 20th and the letter was headed. 'termination of employment'. He did not dispute that he lodged an appeal. A colleague was present at hearing but he did not request for his colleague to speak and that his colleague sought to speak and was not allowed to. He testified that he was not shown the proceedings on that day and did not see the notes during the disciplinary hearing. He stated that subsistence initially was 2,000/- then it rose to 4000/- and the requirement for receipts was when the amount was raised to 4000/- in May 2012. He did not personally object to this requirement and he confirmed that he was given a certificate of service.

24. In re-examination by Mr. Kubai he testified that in the terms and conditions of service for locally engaged civilians, there is no procedure for investigation. He stated that he never signed on the notes of proceedings was not asked to sign and did not even see the document shown as notes of proceedings. He stated that the Kshs. 4000/- was daily entitlement.

25. The next Claimant witness was James Gichane Roche who worked as a driver. He testified that he used to be given assignments out of the station and for work to Nairobi he would be given 4000/- for food, accommodation, lunch and breakfast. He testified that he used to spend it all and that before 2012 they never used to give receipts. Receipts were introduced in 2012 and that the terms of service did not require receipt. He testified that he gave in receipts which he got from the hotel. He testified that he paid and was given the receipts at hotel. He testified that the money was subsistence and this never changed. He was told of an explanatory hearing and had the option to go on his own or use the Works Council. He decided to use the works council and did not attend. When they represented him they sought answers from management and no answers were forthcoming. He testified that the staff were addressed at parade and were dissatisfied and they went to labour officer. He testified that the labour officer asked some people to stay behind and the rest of the staff went back and resumed work as usual and were addressed at parade. He testified that the Labour officer addressed them and told them that the hearing would only take place if management decided to. He confirmed that the staff were called for disciplinary hearing and initially they were 46, and 18 of them were dismissed out of the 46 summoned. He stated that he was sacked and the allegation was that the receipts were fraudulent. He was not taken to the police and the police did not investigate him. He testified that he was taken to Kahawa Barracks Kifaru camp and he went in with a colleague who did not speak. He stated that his colleague was not asked his name and did not even talk. He stated that there were 3 persons in there, one was the judge, there was a Registrar as the person recording. He testified that he was not shown the proceedings and did not sign. He stated that he was sacked on the spot and was sent to the next building where Maj. Farrington was and the Major left briefly and returned with 500/- for him to use to travel back to Nanyuki. He testified that Maj. Farrington drove him to the gate. He stated that he had 2 charges - failure to attend disciplinary and the fake receipts. He confirmed that the letter of termination only referred to gross misconduct and after dismissal he was given bus fare. He testified that he was given his certificate of service and even appealed the dismissal and the verdict of the appeal was to uphold the decision to terminate. He sought payment of gratuity for 15 years, notice and damages incurred and stated that he cannot get employment. He stated that he is 55 years and that he joined BATUK in 1998 and that his reputation was messed.

26. In cross-exam by Miss Kashindi he confirmed that he could see the part written 'must attach receipts' and he agreed he could not refuse to attach receipts. He stated that the money increase was okay as it was better. The increase was by employer and he had no problems with

attachments of receipts. He confirmed he was required to ensure the particulars were correct. He stated that imprest is where you account and if you spend more you get a full refund but subsistence is fixed. He testified that he only accounted for what he was given. If one spent extra days working the employee was to claim for the extra days. He stated that the receipts were attached after detailment. The subsistence was for the period one worked out. He stated that the investigatory hearing did not take place and that he saw the letter they wrote but did not read the details. He indicated that he had not found work though he had looked for work. He testified that he got a certificate of service.

27. In re-exam by Mr. Kubai, he testified that the subsistence for February 2009 had no requirement for receipt to be attached.

28. The next witness was Richard Joseph Mutuku Kalii who was presently unemployed. He worked with BATUK as a driver from 2007 till 2013 and left due to dismissal. He stated that there was an allegation of fraudulent claims and asserted that he did not place a fraudulent claim involving night out subsistence allowance. He testified that he was normally given 4000/- a night as subsistence and they were not supposed to return anything at all. He booked his night at Upways Hotel rested for 2 hours, took supper at hotel and met a friend and went out. He stated that previously no receipts were required but from May 2012 receipts were required. He stated that it was added in the claim form and the requirement was not in standing orders. He stated that in the terms of service, investigatory hearing was provided for. He testified that there was a walkout at the camp and the staff went to labour officer and the issue was resolved and the return to work formula given. He testified that he attended the disciplinary hearing in Nairobi and he was accompanied by a colleague who did not even speak. He stated that he was dismissed with one month notice but was not given any copy of the proceedings. He served for the one month in the same capacity and during the one month, he could not remember if he went out. He testified that the letter of dismissal did not cite any section. He had 2 charges for the claim and one for going on strike. He was dismissed and wrote a letter of appeal and did not know if appeal was heard. All he received was a letter and that appeals were supposed to go to the Commander. The letter he received was to the effect that they had considered his appeal and the termination upheld. He sought damages for tarnishing of his name, gratuity and notice.

29. In cross-examination by Miss Kashindi, he testified that since joining BATUK he received subsistence allowance and it was only from 2012 that receipts were to be attached. He never objected. Subsistence is only given when one spends a night out of station. He confirmed that no investigatory hearing took place. He conceded that he did not spend the whole night at Upways. He stated that his appeal was dismissed and that he was paid for the month he was dismissed. He did not see the record of proceedings. He stated that there was an officer in uniform and she was taking notes.

30. The Claimant then called Patrick Machira Mathenge and Joseph Kariuki Gatita who both testified on similar lines. Next up was Meshack Kathenge Ndirangu who sought in addition to the sums for notice, gratuity and damages, a refund of Kshs. 600,000/- he repaid as a loan to the SACCO he had borrowed from. Ramza Malik Kaka followed and in cross-examination stated that he did not know who used to sell the receipts at BATUK and that he never bought the receipts. Next was Ernest Mwangi Wambugu and then Isaac Mugi Nderitu. Isaac Mugi Nderitu testified that he was a driver from 2008 till February 2013 and would get a refund on claims. He testified that the amount was claimed on a form that they used to call subsistence claim form and that they never called it imprest. He testified that the receipts he gave were from Upways Hotel reception. They were later told that the receipts were fake and that the receipts had not come from the hotel. He testified that he was a member of the Works Council and the WC met and the agenda was the investigation. The whole Works Council decided that they needed to hear the legal employer, the Commander, before responding. The WC advised staff to wait to see what employer was to say and the employer said that the employer would need to continue with investigations. The staff walked out and at Nanyuki labour office where the representatives of the employer attended and after discussions they returned to camp in company of Labour Officer and the Labour Officer was given authority by Commander to address the staff. He confirmed that he went for hearing and he was accompanied by his colleague who was not allowed to speak and just sat there. On management side, there was a Colonel from abroad, Maj. Strudwick the DCOS and a lady taking minutes. She was an officer. He testified that it was intimidating and they wore uniforms. He felt he was in court and that he was a civilian. He testified that he replied to all questions. He was asked if he knew procedure of subsistence claim and replied in affirmative. He stated the days in his claim were correct and was asked if receipts were genuine. He confirmed receipt was genuine. He testified that he was then asked about the serial numbers and said he did not know about that as he did not have the capacity. He stated when he was issued receipt he believed they were genuine and maintained he had stayed at hotel. He testified that he was dismissed for gross misconduct. He stated that he did not incite staff. He testified that he appealed and that staff left appeals at main gate. He denied the letter on the Respondents response page 126 was his appeal letter. He testified that the following Monday he went to Nanyuki Sports Club to play golf and as he approached the last green, he met Mr. Monihan at the pavilion and that Monihan told him his appeal could not aid him and would prefer if he wrote another appeal. He replied that the appeal was the truth and so he did not wish to change it. He testified that Monihan asked him to think about it and meet Monihan the next day at 2.00 p.m. He stated that at 2.00 p.m. the next day Monihan gave him an A4 envelope and that was the first time he had seen the letter exhibited by the Respondent. He testified that he did not return the letter and it is not signed. He testified that the letter states that he had bought the receipts from an unnamed colleague and the tenor of the letter was like he was asking for forgiveness. He testified that he did not buy any receipt and that the management has his letter of appeal. He testified that he had a copy but did not have it. He sought gratuity, damages plus benefits. At the time he was dismissed he had taken a bank loan and got problems and even now the bank is looking to him to pay. He stated that he cannot get a job due to the letter which was written that he had robbed his employer

31. In cross-examination by Miss Kashindi he confirmed that he got a certificate of service. He stated that the letter he received had only 4 charges and that he had not seen the one with 6 charges. He confirmed that he was a member of the Works Council and that they met during working hours and that they had been given approval to meet during office hours. He stated that he did not object to attaching receipts as required in the form and that he never had an issue with increase to 4,000/-. He stated that the WC did not meet the other staff and incite them.

32. The Court sought to see the original letter issued to Mr. Mugi. The Court confirmed the slip at bottom of the Claimant's letter 20th March 2013 had been torn off.

33. Bedan Maota Kaaria the Deputy Labour Officer, Laikipia County was next to testify for the Claimants. He testified that in respect BATUK, when the staff came to his office they had 11 grievances which were sieved to a few. Amongst the many was the issue of subsistence allowance and he met the employer representatives Maj. Farrington, the Commanding Officer and the Quarter Master. He testified the employees were represented by Reuben Ikatwa Chairman of Works Council, Member Ayub Kimathi, Ablon Baraza, Isaac Mugi, Anthony Gichohi Vice Chairman of WC, Jane Oyugi member WC and other staff members were Moses Gitau, Joseph Kairu, Andy Wairagu, Martin Kathai, Patrick Kuria and Alfred Muita, Area Manager. He testified that he sat with these people and addressed the grievances one by

one. Issues discussed included safety of employees; abuse and misuse of language by military, threats from uniformed officers to civilians, terms and conditions of service, receipts for out-of-duty station, work investigations involving 48 employees. He testified that they agreed there would be no victimization by any party and that he wrote the agreement which he signed, the Commander and Works Council. On issue regarding the receipts, he advised that subsistence allowance is not initiated by employee but by employer and is on a set rate by employer and is given to an employee to go to work out of station and the money is meant to meet accommodation and 3 meals. If the employee spends more, he cannot seek for additional sums. He stated that subsistence is not accounted for by receipts and is set for region. On the issue of the receipts in contention he stated he is not expert in ascertaining if the receipts were genuine or not and it was agreed that the employer was to investigate the authenticity of the receipts. He advised that fraud is serious case and if employer had evidence there was fraud, the employer should report to police and follow it up. He stated that the employer decided not to pursue the issue as dismissal and loss of benefit was sufficient punishment. He testified that imprest is initiated by employer who states the duty or task the employee is to undertake outside the station. He stated that imprest is special imprest, temporary imprest and standing imprest. Standing imprest is used on weekly basis and is accounted for before it is replenished. Temporary imprest must be surrendered with 48 hours after issue: He testified that imprest initiated by employee and imprest and subsistence are not one and the same - one is initiated by employee and other by employer. He testified that he wrote a return to work formula that was signed and that it was after the return to work formula when the letters of dismissal were issued.

34. In cross-exam by Miss Kashindi, he testified that the employees were on a walk-out from the place of work to the labour office. He stated that he did not investigate if they had given notice before coming to his office and did not think that was relevant. He stated that employees had grievances which were dismissed. He stated that an employer should set up structures but these should not supersede the labour laws. He testified that subsistence allowance does not require submission of receipts according to norms. He stated that the Respondents are supposed to be governed by the Laws of Kenya. He stated that he did not come across the regulations of the Respondent. He testified that they had agreed on the Return to Work Formula and the dismissal letters went against the return to work formula. He stated that termination went against this because it was victimization. He testified that on the receipts, the Respondent had the right to investigate the fraud. He testified that the Respondent opted not to pursue the fraud against its employees. He stated that the employees felt that the summary dismissal was not fairly or lawfully done. He testified that he wanted to reconcile it at the office and that he was very neutral in the case. He testified that he received a letter from the Respondents' counsel which confirms the position of Respondent. He saw reference to Section 47 of Employment Act he did not respond to the letter. He stated that he had called the Respondents to a meeting and they did not respond.

35. He was re-examined by Mr. Kubai and testified that there were 273 employees in the walkout and that the walkout paralysed the operations of the employer and the grievances were to be addressed. He advised them on what to do on the fraud which was to report to police have investigations undertaken and if charges are prepared the official would be suspended or interdicted or terminated.

36. John Ndichu Ngige, Malik Njogu, Geoffrey Muthee Kariuki and Richard Yegon concluded the Claimants testimony. They all testified that they were given tasks out of their station in Nanyuki and they spent their nights at Upways Hotel and that prior to 2012 there was no need to attach receipts. They stated that they never objected to the attachment of receipts when the requirement was introduced in May 2012 and that they never attended the investigatory hearing as they expected to have the Works Council represent them. They testified that they participated in the walk out and were later summoned to Kahawa Barracks Kifaru Camp where they were taken through a disciplinary process and were dismissed by the officer presiding. They received their certificates of service.

37. The Respondents called John Njoroge the Director of Upways hotel. He testified that the Respondents staff came with staff claims that required clarification and brought copies of receipts which had been attached to the claims. He scrutinized a number and found that they had not been issued by the Hotel. He wrote a letter to that effect and that he noted there were differences in the receipts. The genuine receipts bore the correct spelling of the word investment and the erroneous ones had a misspelt website, PIN number was incorrect, even the wrong telephone number and double spacing. He testified that the BATUK staff had submitted false claims as the staff had purported to stay at the Hotel and the receipts had been misrepresented as being from his Hotel. He was not aware of there were prosecutions.

38. In cross-examination by Mr. Kubai he testified that he had 2 hotels named Upways and that one is in Nairobi along the Super Highway opposite Kenya Breweries and the other one in Thika along the Mangu - Gatukuyu Road. He stated that he had the overall responsibility of running the hotels and had staff, systems and processes in place to manage the hotels just like any other business which has multiple branches. He stated that the issue of receipts was brought to him by the Human Resource Manager or Administrator of BATUK. The lady came with another member of staff and they wanted him to confirm if the receipts were issued by the hotel and he went through the receipts and in almost all the instances none of the receipts had originated from the hotel. At a later time some staff from BATUK came with police and BATUK officers and he could recall Martin Musyoka from the receipts. He stated some specific receipts bore the correct name and specifically mentioned receipt 1797 and 1798 which bore the correct name of the hotel but the amounts were different. The originals were different. They were indicated as having been signed by Monica and the duplicates he found had different figures and signed by different people. He testified that like in any organization there are cases of mismanagement and one takes corrective action and he had reported one case against Monica and it was a complaint about a customer who was issued with false receipt. To the best of his knowledge the police did not complete investigations. He testified that Monica is not working at the hotel as she was dismissed long ago for that first case of fraud. He stated that Monica was fraudulent and at some stage she was actually arrested. He stated that his Hotel had rooms for 4,200/- and it is not a problem to let the rooms but from the records they did not see record of the rooms being occupied. He stated that the purported receipts were not issued by the hotel and most of the receipts were signed by staff he had dismissed in August 2012. He stated that the lists dated November, September, October were long after Monica had left and that the ones that were issued when she was there were different from duplicate. He concluded that the receipts for Musyoka were forged as the amounts did not agree with duplicate amounts. He testified that the majority of the receipts were forged.

39. In re-exam by Miss Kashindi he stated that he had absolutely no control over police investigations. He was referred to receipts 1797 and 1798 and checked with the duplicates of the receipts. He confirmed that the one written to Musyoka has a name 'cash' and the one produced to BATUK is in name of Musyoka. The cash is 4,200/- and is for accommodation. The one in duplicate is for 1,500/- and is for accommodation. The signatures to BATUK and the hotel copy are different. Though original was from hotel it was forged.

40. The next defence witness was Major Michael John Farrington who stated that he worked at BATUK - British Army Training Unit Kenya. He testified that it holds training of troops from UK for preparation for operations elsewhere and that BATUK is a sub-unit of the British Army. He stated that he was head of Human Resource Management at the time and that there were a number of factors leading to dismissal

and majority of the Claimants were dismissed for fraudulent actions and some were dismissed for failing to follow instruction and 2 for instigating industrial actions against Respondent. He testified that they wanted to conduct an investigatory hearing for the 46 LECs. There was a mass refusal and none of the 46 attended. He stated that he gave a second opportunity and they refused to attend and it was thus impossible to undertake investigatory hearing and he then proceeded to disciplinary process and issued notices. The notices gave a time and place and the accusations in line with Kenyan law. He testified that BATUK then conducted the disciplinary hearing and each individual received the letter and the letter set out the time and the charges. BATUK conducted the disciplinary hearing and a number of the staff were summarily dismissed, some on notice and some were given final warning. He stated there is an appeal process and the decision of the Commander in some case upheld decision of the disciplinary cases and on others he reversed it. He stated that a number of facts/issues that drew their attention to the fraud. The use of Upways raised concern as the staff could use any hotel and they wondered why the staff concentrated on one hotel. They checked and the LECs had not generated the business to the hotel as the receipts were in region of 680,000/- and the Hotel did not have such income or business from the BATUK staff. The maximum spend of 4,000/- was for LEC's. Previously to that it was 2,000/- and the Works Council had complained 2,000/- was not sufficient and it was upped from 2,000/- to 4,000/- with requirement that receipts be provided. The BATUK subsistence allowance form required that the staff gives a certificate that the receipts timings and other particulars are correct. He testified that any forged receipt does not comply with this certificate. The certificate at bottom authorizes recovery from salary if receipts and claims are not submitted. The form indicates "must attach receipts". He stated that LEC's are entitled to expenses when on detached duties and receipts must be submitted with all claims. The amount is extraneous to salary. Substance allowance is paid to staff for subsistence and the money can be claimed in advance. He testified that there were certainly some issues at Upways Hotel and it is documented there were staff of Upways under investigations. In terms of The Claimant's receipts it did not give right to our LEC's to produce forged receipts. He was referred to the appeal by Isaac Mugi and stated that the basis of the appeal under heading of fraud Isaac Mugi stated that he had decided to buy fake receipts and said this would not happen again and under para headed incitement Isaac Mugi asked that he be excused. He testified that it was known there was lots of intimidation by Works Council or member of WC. He stated that he got SMS and calls from some of the 46 who wanted to attend as they had nothing to hide. He stated that the refusal to follow instructions was gross misconduct and that many in the group of 46 were intimidated and if anyone had attended they would have been punished. He stated that investigatory hearings are important to set what is the charge. Its purpose is two fold - for employer to put evidence and correspondence to employee and then employee to respond and it is then for the investigator to see if to pursue disciplinary process or not. He testified that the changes to the form had been communicated and that he was mandated to change the terms and conditions of service and that he had the authority as head of Human Resources. He stated that he had made many changes - pay grades, selection and recruitment, how the staff are trained etc. He stated that there is not a great deal of difference between imprest and subsistence. Subsistence are expenses incurred when out of duty and imprest is the process of accounting. He testified that the labour office is not a financial expert in matters of BATUK. He confirmed that he had a meeting at Labour Office and disputed that the document produced by the Claimants was a return to work formula. He read it and it was not signed by him and was signed by Commander. It does not bind BATUK as it was a set of minutes. He stated that the minutes do not reflect the four hour meeting and they were not bound by it. He testified that if it was a record and it was accurate and legible it would have been a document they could consider. He testified that the stamps on the documents are part of the audit process. He stated that everything that BATUK did must be compliant to Kenya Labour Law and nothing in Kenyan Labour Law told BATUK how to audit its accounts. He stated that it appeared the cost was 4,000/- or 4,200/- and the staff had a maximum spend of 4,000/- and according to receipts they spent 4,200/-. He testified that an LEC would not pay 200/- out of their pocket for a few days and this aroused much suspicion. He testified that if the Upways staff were committing fraud that is not a licence for BATUK staff to commit fraud. BATUK now contracts hotels in Nairobi, a hotel in Mombasa, Nanyuki and Archers Post and there is no temptation to put money in the hand of staff who then they stay with friends and claim the funds. He stated that he did not see an LEC paying 200/- out of pocket for 10 days as this does not make sense. It is not in keeping with LEC spend more than they are getting. He stated that if you cannot spell investments do not try fraud. He stated that BATUK charged the staff with fraud and the staff admitted they committed fraud. He testified that the Respondent claims against each of the LEC's on the claim. They had a disciplining process where they were accused of fraud, some were accused of failing to follow instructions and they were found guilty of gross misconduct and fraud is serious offence, it is a criminal offence. He confirmed that they did not refer these fraud cases to the police as at the time BATUK felt that following the disciplinary process and the fact the staff could lose their jobs and was sufficient sanctions. Criminal investigations would be conducted by the police and BATUK pursued internal disciplinary process and did not refer any of the LEC's to police. He testified that 46 staff filed fraudulent claims and not all the 46 were dismissed. He stated that 16 were dismissed summarily and 23 were dismissed with notice. He stated that it is clear Reuben as chair of works council was instrumental in getting all staff to walk out. A strike is legal if it is under Section 80 and stated that the law does not protect the walkout.

41. The parties filed submissions and the Claimants' submissions were filed on 2nd June 2015. In them, the Claimants submitted that they had proved their case and demonstrated that the change in subsistence allowance was improper as it was not authorised and that the Claimants were victimized. The Claimants submitted that they were entitled to non accountable subsistence allowances for the night outs in Nairobi, Nanyuki, Archers Post and Mombasa. The Claimants submitted that the appeals against dismissal were to be referred to the Civil Secretary HQ Land Welfare Centre for Belize and Kenya. The Claimants submitted that the forfeiture of gratuity was unlawful as the authority to grant forfeiture of gratuity must be sanctioned by the Civil Secretary HQ Land Welfare Centre for Belize and Kenya. The Claimants submitted that the 'confession' was not a confession as Isaac Mugi could not type and that he had disowned the document in Court. The Claimants submitted that the sums claimed in the Counter Claim were erroneous and that the Claimants were not liable to the Respondents for the sums claimed. The Claimants submitted that the Respondent had damaged their reputations and they were entitled to recover damages for this. The Claimants relied on International Labour Organisation Convention 87 on Freedom of Association and Protection of the Right to Organize as well as International Labour Organisation Workers' Representatives Convention 135 and International Labour Organisation Recommendation 143 Concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking.

42. The Respondent submitted on 1st July 2015 and crystalized the issues to two:-

- a. Whether the Respondent had just cause to dismiss the Claimants.
- b. Whether the Respondent followed the proper and fair procedure in dismissing the Claimants.

43. The Respondent submitted that the Claimants submitted false claims for subsistence and failed to attend investigatory hearings contrary to management instructions. The Respondent submitted that Reuben Ikatwa and Isaac Mugi faced additional charges of incitement and leading an unlawful strike. The Respondent submitted that it was entitled to dismiss the Claimants for the gross misconduct and relied on the

case of **Sarah Wanyaga Muchiri v Henry Kathii & Another [2014] eKLR** in which the Court cited with approval the decision of Lord Denning in **British Leyland UK Ltd v Swift [1981] IRLR 91** and the cases of **Banking Insurance and Finance Union (Kenya) v Consolidated Bank of Kenya Limited [2014] eKLR** and **Whencelause Gilbert Jumba Swinnerstone v Ryce East Africa Limited [2014] eKLR**. The Respondent submitted that the process it followed was fair, proper and according to the law. The Respondent relied on the case of **Charles Bosire v Medicins Sans Frontieres (Holland) Industrial Cause No. 635 (N) of 2009** where 3 days were held to be enough time to prepare a defence. The Respondent relied on the case of **James Mugeru Igati v Public Service Commission Kenya [2014] eKLR** and **Jaspher Basweti Mairongi v Tusker Mattresses Limited [2014] eKLR** where it was held the criminal and disciplinary processes are different from each other and that the Respondent did not need to wait for the criminal process to be concluded before initiating disciplinary action. The Respondent also placed reliance on the case of **Ismail Hassan v Kenya Ports Authority [2013] eKLR**. The Respondent submitted that no false information was published to third parties and the Claimants had not demonstrated that their reputation had been injured as a result of malicious publication of false information. The Respondent submitted that the counter claim had been proved on a balance of probability. The Respondent thus submitted the Claimants suit be dismissed and judgment entered for the Respondent against the Claimants on the counterclaim.

44. The Claimants were employees of the British Army Training Unit in Kenya BATUK. The Claimants were dismissed as a result of false claims made in 2012 in respect of their subsistence allowance. The Claimants allege they were defamed and their reputation injured. The Claimants sought relief ranging from gratuity to damages for the dismissal and also payment of loans in respect to some of them. The Respondent on its part alleged the Claimants were dismissed for good cause and the Respondent was entitled to refund of sums claimed for subsistence allowance in respect of the monies accounted for with fraudulent receipts.

45. The Claimants were dismissed after hearings held at Kahawa Barracks, Kifaru Camp. Each of the Claimants was given a notification of the meeting scheduled by the Respondent and each was permitted to have a representative of their own choice accompany them. The Claimants were in some cases dismissed summarily and others with notice. The Claimants were in a sense accorded a fair trial in terms of Section 41. What needed the Court was the inability of the Respondent to ensure that Maj. Strudwick was not a part of the process in that he was the prosecutor. Maj. Farrington would have undertaken the role effectively and was independent. The Colonel who heard the Claimants was impartial but the Claimants inevitably raised the issue of the attempt by Maj. Strudwick to coerce them to accept wrongdoing. The Court notes that the mass walkout by staff to the Nanyuki Labour Office was unlawful as the law was not complied with. The Works Council was misled to think that it had the capacity to call for the strike in the manner that it did. The Respondent asserts that it lost money as a result of the fraudulent claims. Indeed some of the receipts produced in respect of some of the Claimants were fraudulent. It matters not that the police investigations were not concluded. It matters not that fraud is a criminal offence under the laws of Kenya. An employer is entitled to dismiss for good cause even if the criminal process is not pursued or is incomplete. As has been decided in cases before this one, the mere existence of a parallel investigation for criminal culpability is no bar to disciplinary process at the workplace. Section 44 of the Employment Act is clear. The Respondent was not guilty of infarctions against the Claimants right to assemble. The right to assemble and participate in union activities does not extend to a right to unlawful industrial action. The strike or mass walkout in 2012 was not protected and was not what is contemplated in the salutary international conventions and recommendations cited. Kenyan labour is misguided in thinking that illegal action can be protected by the law. No strike conducted in the manner the walkout was conducted can be protected by the International Labour Organisation Conventions or Kenyan Labour Laws. The Respondent was wrong in the forfeiture of gratuity as no correspondence or proof of adherence to the Respondent's own process of forfeiture were followed. The Claimants who qualified for gratuity are entitled to receive the gratuity payment in full. The Respondent has not proved the sums due to it from each Claimant who is alleged to have defrauded it. There are discrepancies in the sums sought and the receipts that were produced to prove the loss. It is not for the Court to calculate the Respondents loss. The Respondent's counterclaim is dismissed but each party to bear its own costs.

46. The Court considered some of the documents produced by parties to be inaccurate as the appeal of Isaac Mugi demonstrated. The staff who wished to appeal was required to detach a portion of the letter and submit to the Respondent. The actual letter in this case was shown to Court and the slip at the bottom had been detached. It seemed curious that the alleged appellant later typed another appeal on A4 paper in which he confessed to purchase of receipts to defraud the Respondent. Forensic examination of the forgeries would have assisted in squarely apportioning the blame as there is possibility there was a third hand in this.

47. In the final analysis, the Court finds that there was basis for termination as the employees did not properly account for expenditure received. The staff were accorded a modicum of fair trial in terms of Section 41. However, the revocation of gratuity was not procedural even if the termination called for sanction to that extent. The Claimants entitled to gratuity are to receive the payment due as the Respondent did not follow its own procedures to revoke it. For the Respondent there will be no recovery for the sums alleged to have been lost. Each party to bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER 2015

NZIOKI WA MAKAU

JUDGE