



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1062 OF 2017**

**JAMES KIOKO MWANTHI & 12 OTHERS.....CLAIMANT**

**- VERSUS -**

**ATHI RIVER SHALOM COMMUNITY HOSPITAL.....RESPONDENT**

**JUDGMENT**

By a memorandum of claim dated 8<sup>th</sup> June 2017, filed on the same day, the claimants sued the respondent alleging unfair termination. Claimant No. 1 – 12 were engaged as cleaners while claimant number 13 was employed as a security guard. The claimants were employed on diverse days and monthly salaries as follows: -

James Kioko Mwanthi	6/7/15	-	12,500
Bebson Mutuku Kioko	5/12/2015	-	12,500
Haron Muema Muasa	2/6/2015	-	13,100
Onesmus Munyoki Kithitu	13/4/2016	-	11,623
Jackton Marango Wafula	8/6/2012	-	14,500
Martin Ndunda Muia	16/11/2016	-	13,000
John Musembi Wambua	21/5/2012	-	15,500
Felix Mutonga Munyiva	15/5/2013	-	14,500
Justus Kioko Kisila	22/11/2012	-	14,500
Nicholas Kavoi Mutua	1/09/2010	-	15,000
Jennefer Ngina Komu	1/5/2010	-	15,000
Onesmus Mutuku Kivula	4/4/2016	-	11,610
Kennedy Omwoso Olanda	1/12/2013	-	13,029

All the claimants sought the same reliefs as follows: -

**James Kioko Mwanthi**

- i. One month's salary in lieu of notice ..... Kshs. 11,040
- ii. Unpaid/untaken leave for period of 6 years being (Kshs. 11,040 x 1 year) ..... Kshs. 11,040
- iii. Unpaid/untaken public holidays for the entire duration of service being (11/30 x Kshs. 11,040 x 1 year) ..... Kshs.4,048

iv. Damages for unlawful/unfair termination calculated 12 months gross salary being (Kshs. 11,040 x 12 months)  
..... Kshs. 132,480

Total claim ..... **Kshs. 158,608**

v. The claimant also claims certificate of service.

**Benson Mutuku Kioko**

i. One month's salary in lieu of notice ..... Kshs. 12,500

ii. Unpaid/untaken leave for period of 1 year being (Kshs. 12,500 x 1 year) ..... Kshs. 12,500

iii. House allowance for the entire period of service being (15/100 x 12,500 x 1 year) ..... Kshs. 22,500

iv. Unpaid overtime worked being (Kshs. 12,500/30 x 1/8 (52 per hour) x 4 hours x 30 days x 12 months x 1 year of service x 1.5  
being ..... Kshs. 112,500

v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 12,500 x 1 year x 2 (double rate)  
..... Kshs. 9,166

vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 12,500 x 12 months)  
..... Kshs. 150,000

Total claim ..... **Kshs. 319,166**

vii. The claimant also claims certificate of service.

**Haron Muema Muasa**

i. One month's salary in lieu of notice ..... Kshs. 13,100

ii. Unpaid/untaken leave for period 5 years being (Kshs. 13,100 x 1.5 years) ..... Kshs. 19,650

iii. House allowance for the entire period of service (15/100 x 13,100 x 18 months being (1.5 years) ..... Kshs. 19,650

iv. Unpaid overtime worked being (Kshs. 13,100 x 1/8 (Kshs.55 per hour) x 4 hours x 30 days x 12 months x 1.5 years of service)  
..... Kshs. 78,600

v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 13,100 x 1 year x 2 (double rate)  
..... Kshs. 9,606

vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being Kshs. 13,100 x 12 months  
..... Kshs.157,200

Total claim ..... **Kshs. 331,211**

vii. The claimant also claims certificate of service.

**Onesmus Munyoki Kithitu**

i. One month's salary in lieu of notice ..... Kshs. 11,623

ii. Unpaid/untaken leave for period of 5 years being (Kshs. 11,623 x 9/12 being 9 months worked) ..... Kshs. 8,717

iii. House allowance for the entire period of service being (15/100 x 11,623 x 9 months) ..... Kshs. 15,691

iv. Unpaid overtime worked being Kshs. 11,623/30 x 1/8 (Kshs. 48 per hour) x 4 hours x 30 days x 9 months of service x 1.5)  
.....Kshs. 78,455

v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 11,623 x 2 (double rate)  
..... Kshs. 8,524

vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 11,623 x 12 months)  
..... Kshs. 139,476

Total claim ..... **Kshs. 262,486**

The claimant also claims certificate of service.

**Jackton Marango Wafula**

i. One month's salary in lieu of notice ..... Kshs. 14,500

- ii. Unpaid/untaken leave for period of 3 years being Kshs. 14,500 x 4.5 years) ..... Kshs. 65,250
- iii. House allowance for the entire period of service being (15/100 x 14,500 x 12 x 4.5 years) ..... Kshs. 117,450
- iv. Unpaid overtime worked being Kshs. 14,500/30 x 1/8 (Kshs. 60 per hour) x 4 hours x 30 days x 12 months x 4.5 years of service x 1.5) ..... Kshs.587,250
- v. Unpaid/untaken public holidays for the entire period of service being (11/30 x 14,500 x 4.5 years x 2 (double rate) ..... Kshs. 47,850
- vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 14,500 x 12 months) ..... Kshs. 174,000

**Total claim ..... Kshs. 1,006,300**

vii. The claimant also claims certificate of service.

#### **Martin Ndunda Muia**

- i. One month's salary in lieu of notice ..... Kshs. 12,500
- ii. Unpaid/untaken leave for period of 2 years being (Kshs. 12,500 x 1 year) ..... Kshs. 12,500
- iii. House allowance for the entire period of service being (15/100 x 12,500 x 12 x 1 year) ..... Kshs. 22,500
- iv. Unpaid overtime worked being (Kshs. 12,500/30 x 1/8 (Kshs. 52 per hour) x 4 hours x 30 days x 12 months x 1 year of service x 1.5 ..... Kshs. 112,320
- v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 12,500 x 1 year x 2 (double rate) ..... Kshs. 9,166
- vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 12,500 x 12 months) ..... Kshs. 150,000

Total claim ..... Kshs. 318,986

vii. The claimant also claims certificate of service.

#### **John Musembi Wambua**

- i. One month's salary in lieu of notice ..... Kshs. 14,500
- ii. Unpaid/untaken leave for period of 4 years being (Kshs. 14,500 x 5 years) ..... Kshs. 72,500
- iii. House allowance for the entire period of service being (15/100 x 14,500 x 12 x 5 years) ..... Kshs. 130,500
- iv. Unpaid overtime worked being Kshs. 14,500/30 x 1/8 (Kshs. 60 per hour) x 4 hours x 30 days x 12 months x 5 years of service x 1.5) ..... Kshs. 625,500
- v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 14,500 x 5 years x 2 (double rate) ..... Kshs. 53,166
- vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 14,500 x 12 months) ..... Kshs. 174,000

**Total claim ..... Kshs. 1,097,166**

vii. The claimant also claims certificate of service.

#### **Felix Mutonga Munyiva**

- i. One month's salary in lieu of notice ..... Kshs. 14,000
- ii. Unpaid/untaken leave for period of 2 years being (Kshs. 14,000 x 3.5 years) ..... Kshs. 49,000
- iii. House allowance for the entire period of service being (15/100 x 14,000 x 12 x 3 years 6 months) ..... Kshs. 88,200
- iv. Unpaid overtime worked being (Kshs. 14,000/30 x 1/8 (Kshs. 58 per hour) x 4 hours x 30 days) ..... Kshs. 453,600
- v. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 14,000 x 12 months) ..... Kshs. 168,000

**Total claim ..... Kshs. 808,733**

vi. The claimant also claims certificate of service.

**Justus Kioko Kisila**

- i. One month's salary in lieu of notice ..... Kshs. 14,500
- ii. Unpaid/untaken for period of 1 year being (Kshs. 14,500 x 4 years 1 month) ..... Kshs. 56,000
- iii. House allowance for the entire period of service being (15/100 x 14,500 x 12 x 4 years 1 month) ..... Kshs. 104,400
- iv. Unpaid overtime worked being (Kshs. 14,500/30 x 1/8 (Kshs. 60 per hour) x 4 hours x 30 days x 12 months x 4 years 1 month of service x 1.5) ..... Kshs. 522,000
- v. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 14,500 x 12 months) ..... Kshs. 174,000

**Total claim ..... Kshs. 913,433**

vi. The claimant also claims certificate of service.

**Nicholas Kavoi Mutua**

- i. One month's salary in lieu of notice ..... Kshs. 15,000
- ii. Unpaid/untaken leave for period of 1 year being (Kshs. 15,000 x 6 years) ..... Kshs. 90,000
- iii. House allowance for the entire period of service being (15/100 x 15,000 x 12 months x 6 years) ..... Kshs. 162,000
- iv. Unpaid overtime worked being (Kshs.15,000/30 x 1/8 (Kshs. 62.5 per hour) x 4 hours x 30 days x 12 months x 6 years of service x 1.5) ..... Kshs. 810,000
- v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 15,000 x 6 years x (double rate) ..... Kshs. 66,000
- vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being Kshs. 15,000 x 12 months ..... Kshs. 180,000

**Total claim ..... Kshs. 1,323,000**

vii. The claimant also claims certificate of service.

**Jennefer Ngina Komu**

- i. One month's salary in lieu of notice ..... Kshs. 15,000
- ii. Unpaid/untaken leave for period of 1 year being (Kshs. 15,000 x 6.5 years) ..... Kshs. 97,500
- iii. House allowance for the entire period of service being (15/100 x 15,000 x 12 months x 6.5 years ..... Kshs. 175,000
- iv. Unpaid overtime worked being (Kshs. 15,000/30 x 1/8 (Kshs. 62.5 per hour) x 4 hours x 30 days x 12 months x 6.5 years of service x 1.5) ..... Kshs. 877,500
- v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 15,000 x 6.5 years x 2 (double rate) ..... Kshs. 71,500
- vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 15,000 x 12 months) ..... Kshs. 180,000

**Total claim ..... Kshs. 1,417,000**

vii. The claimant also claims certificate of service.

**Onesmus Mutuku Kivula**

- i. One month's salary in lieu of notice ..... Kshs. 11,610
- ii. Unpaid/untaken leave for period of 1 year being (Kshs. 11,610 x 11/12) ..... Kshs. 4,257
- iii. House allowance for the entire period of service being (15/100 x 11,610 x 11 months) ..... Kshs.19,156
- iv. Unpaid overtime worked being (Kshs. 11,610/30 x 1/8 (Kshs.48 per hour) x 4 hours x 30 days x 12 months x 6.5 years of service x 1.5) ..... Kshs. 63,855
- v. Unpaid/untaken public holidays for the entire period of service being (11/30 x Kshs. 11,610 x 6.5 years x 2 (double rate) ..... Kshs. 8,514
- vi. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 11,610 x 12 months) ..... Kshs. 139,320

**Total claim ..... Kshs. 246,712**

vii. The claimant also claims certificate of service.

**Kennedy Omwoso Olanda**

- i. One month's salary in lieu of notice ..... Kshs. 13,029
- ii. House allowance for the entire period of service being (15/100 x 13,029 x 12 months x 2.8 years) ..... Kshs. 62,539
- iii. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 13,029 x 12 months ..... Kshs. 156,348

**Total claim ..... Kshs. 231,916**

iv. The claimant also claims certificate of service.

The twelve claimants gave written authority to Mr. Nicholas Kavoi Mutua to testify on their behalf.

This matter proceeded for hearing on 5<sup>th</sup> August, 2021.

**Claimant's case**

The claimants aver that at all material times all were employees of the respondent hospital.

That on 3<sup>rd</sup> January 2017 the respondents General Manager circulated a memo captioned NEW MANAGEMENT FOR HOUSE KEEPING informing general staff that the respondent had resolved to contract Rene Superclean Services Limited to carry out supervision of the House Keeping Department in all facilities. Members of staff were requested to sign a management contract with the new supervisor M/S Rene Superclean Services Limited by 12.00 on 3<sup>rd</sup> January 2017. The memo further informed affected staff that there would be no loss of salary, benefits or any other amenities accorded to Shalom staff.

The claimants further aver that they all declined to sign the new agreement out of fear of loss of benefits. That on 3<sup>rd</sup> January 2017 the general manager, Mr. Victor ordered the claimants out of the respondent's premises without giving them a chance to explain their concerns.

They further aver that their dismissal was unlawful, unfair, inhumane and contrary to the basic tenets of fair labour practices in that: -

- The claimants were innocent.
- They were dismissed without reasons or explanation.
- They were not accorded termination notice.
- They had served the respondent diligently.

Finally, the claimants aver that they were entitled to the reliefs sought namely; -

- a. One month's salary in lieu of notice
- b. Unpaid leave
- c. House allowance
- d. Overtime pay
- e. Unpaid public holidays
- f. Damages for unlawful termination
- g. Certificate of service

Declaration that their termination was illegal, unlawful, unfair and inhumane.

Compensatory damages amounting to Kshs. 8,434,717.

Costs of suit and interest.

**Evidence**

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> testified through Mr. Nicholas Kavoi Mutua to whom they had given written authority dated 30<sup>th</sup> July 2021 to do so on their behalf. He testified that they were employed by Shalom Hospital, Athi River as cleaners on diverse days and worked diligently until they were terminated by word of mouth on 3<sup>rd</sup> January, 2017.

The reason for dismissal was that the claimants declined to sign a new contract with Rene Superclean Services Limited to which the respondent had outsourced cleaning services.

The witness told the Court that Mr. Victor Obuur, the General Manager issued a memo to the claimants individually informing them that in order to remedy the falling standards of cleanliness at the Shalom Group of Hospitals, management had decided to contract Rene Superclean Services Limited to provide cleaning services in all facilities. The memo informed the claimants that there would be no loss of salaries, benefits or any other amenities accorded to Shalom staff. Finally, the memo required the claimants to sign a management contract with Rene Superclean Services Limited by 12.00 noon on 3<sup>rd</sup> January 2017.

The witness further testified that the claimants refused to sign the contracts because they did not appreciate its terms and implications. That on 3<sup>rd</sup> January 2017, Mr. Victor Obuur gave them two hours to sign the contract leave the compound and refused to entertain their concerns. After the two hours, the respondents used its guards to force the claimants out of the compound. Thereafter, the claimants consulted an advocate for legal advice.

On the reliefs sought in the memorandum of claim, the witness testified that: -

- a. All worked from 6 a.m. to 6 p.m. every day without overtime.
- b. They were never granted leave at any time.
- c. They worked during public holidays.
- d. The claimants were terminated unfairly and were entitled to compensation.

Despite service of summons dated 13<sup>th</sup> June 2017 and the memorandum of claim on 23<sup>rd</sup> June, 2017, mention notice on 7<sup>th</sup> July 2021 as well as a hearing notice for the hearing scheduled on 5<sup>th</sup> August, 2021, the respondent declined to respond to the claim or participate in any way other than entering appearance through a notice dated 15<sup>th</sup> September, 2021.

### **Submissions**

The claimant's counsel submitted that the claimants were employed by the respondent at different times from 2010 to 2016 earning different amounts. Counsel contended that the claimants' termination was unlawful, unfair, inhumane and contrary to the tenets of fair labour practices enshrined in the Constitution and the Employment Act, 2007. That the respondents conduct offended the basic principles of natural justice in that, the claimants were innocent, no reasons were given by the respondent; no notice was issued, yet they had served the respondent well.

According to counsel, the issues for determination are: -

- a. Whether a fair procedure was applied in terminating the claimants.
- b. Whether the claimants are entitled to the prayers sought.

On procedure, counsel submitted that since the respondent gave no explanation, as required by section 41 of the Employment Act and did not prove that there was a valid and fair reason as well as a fair procedure as required by section 45, the termination was unfair.

Counsel relied on the decision in **Donald Odeke vs= Fidelity Security Limited** [2016] eKLR on the right to fair hearing.

On reliefs, counsel submitted that because the claimants were unlawful and unfairly terminated, they are entitled to the reliefs prayed for. The decision in **Stanley Mwangi Gachungu & another vs= Barclays Bank [2019] eKLR** was cited in support.

Further support was sought from the decision in **Walter Ogal Anuro vs= Teachers Service Commission [2013] eKLR** on the essence of substantive and procedural fairness in termination of employees.

### **Analysis and determination**

The issues for discussion are: -

- a. Whether the claimants were employees of the respondent.
- b. Whether the claimant's termination was unfair and unlawful.
- c. Whether the claimants are entitled to the remedies prayed for.

On whether there was a contract of service between the claimants and the respondents, the claimants testified that they were all employees of the respondent. However, only the 5<sup>th</sup> and 6<sup>th</sup> claimants provided copies of contracts of employment. The other employees relied on circumstantial evidence such as the respondents' memo dated 2<sup>nd</sup> January 2017, payslip, NSSF statements, letters of recognition for good work or confirmation letter.

Although this plethora of documents relied upon by the claimants are not contracts of employment, they evidenced a relationship between the parties. The memo dated 2<sup>nd</sup> January 2017 was sent to all the claimants except the 6<sup>th</sup> and 13<sup>th</sup> claimants. Interestingly, whereas the 1<sup>st</sup> claimant was terminated on 31<sup>st</sup> July, 2016, the 6<sup>th</sup> claimant was terminated on 7<sup>th</sup> January 2017, for different reasons but joined the band wagon.

Apart from the 12<sup>th</sup> claimant who relied on the memo exclusively, all the others had at least two documents in support of the relationship with the respondent. This Court finds that on a balance of probabilities the claimants have established that they had a contract of service with the respondent. It was alleged that the 1<sup>st</sup> to 12<sup>th</sup> claimants were engaged as cleaners and the 13<sup>th</sup> claimant was employed as a guard.

On whether the claimants' termination was unfair and unlawful, the claimants counsel submitted that the termination was unfair for non-compliance with the provisions of sections 41 and 45 of the Employment Act, 2007.

Whereas section 45 prescribes the substantive and procedural imperatives in termination, section 41 provides the detailed requirements for a termination to pass the procedural fairness test.

But the evidence on record is scanty. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12 claimants alleged that they were terminated by word of mouth following their refusal to sign a new contract with Rene Superclean Services Limited. It is their evidence that they were forced out of the work place on the afternoon of 3<sup>rd</sup> January 2017. They testified that they were neither given termination letters nor the reason(s) for termination. Their evidence that they were forced out of the compound for refusal to sign a contract with Rene Superclean Services Limited remains uncontroverted.

#### **Were the claimants terminated by the respondent?**

Documents on record show that on 2<sup>nd</sup> January 2017, the respondent issued a memo entitled NEW MANAGEMENT FOR HOUSE KEEPING to the eleven (11) claimants individually communicating the changes of management in cleaning services. The respondent had simply outsourced cleaning services to Rene Superclean Services Limited without involvement of staff in the process and ambushing them with a decision. The claimants had only one option, the respondents' way.

In the words of Mbaru J. in *Elizabeth Washeke and 62 others vs Airtel Networks (K) Limited and Spanco (K) Limited [2013] eKLR*: -

**“Outsourcing has been said to occur where the management of a business prefer to concentrate on the core work of the business and to enter into a contract with another entity to perform services that are peripheral. The transfer must therefore have a transfer of a business as a going concern and the transfer must be by the old employer to the new employer..... The outsourcing does not mean that the rights of employees in whichever entity abate. Quit to the contrary employees either move as part of a going concern in the outsourcing or remain with the employer with their rights unaffected. On the other hand, if such employees wish to terminate their employment and get new employment with the new entity, this is equally regarded. The employee protection both ways is guaranteed..... In the context of the Kenyan Constitution, Article 41 on the Protection of fair Labour Practices.”**

Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

The parameters for a credible outsourcing programme were enunciated in *Wrigley Company (East Africa) Limited vs Attorney General & 3 others [2013] eKLR* where the Court stated that: -

- a. Ordinarily, employers are not expected to outsource their core functions.
- b. An employer will not be permitted to use outsourcing as means to escape from meeting accrued contractual obligations to its employees.
- c. An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect and applying these principles to the instant case, it is evident that the respondent did not comply with Article 41 of the Constitution of Kenya, 2010 and the principles outlined above in order to guarantee the right to fair labour practices.

It was not unexpected that the claimants would be hesitant to sign the new contract since they had not been consulted or prepared for the change. The promise that there would be “no loss of salaries, benefits or any other amenities” did not placate them. They testified that they feared they would lose their permanent employment as had been the case with the respondent. From the evidence on record, the respondent ambushed the claimants with the memo dated 2<sup>nd</sup> January 2017 and gave them the ‘Hobsons Choice’ (take it or leave it). Instead of engaging the claimants to assuage their fears and concerns and explain to them the practical implications of the outsourcing the services to Rene Superclean Services Limited, the respondent employed the sledge hammer approach.

The respondent should have involved and prepared the claimants for the change and secured their buy-in and acceptance. Needless to

emphasize, change management is not an event but a process. It entails preparing supporting and helping employees and organizations in making organizational change. Employees are a critical pillar of successful organizational change. It was the duty of the respondent to involve and engage its work force in the process, to enable them internalize and appreciate the proposed change, justification and implications on the organization and on them and as part of the organization. The respondent was in fact, forcing employment contracts on the claimants. For unexplained reasons, the respondent managed the outsourcing so shabbily and its conduct of chasing the claimants out of the compound of their place of work on the afternoon of 3<sup>rd</sup> January 2017 amounted to a repudiatory breach of contract. The eleven (11) claimants could no longer access their work place.

In *Western Excavating ECC Limited vs Sharp* [1978] 2 WLR 344 Lord Denning stated;

**“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed.....”**

Relatedly, in *Cocacola East & Central African Limited vs Maria Kagai Ligaga* [2015] eKLR the Court of Appeal explained the tests and the guiding principles in cases relating to constructive dismissal as follows:

**“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employers conduct. Entitled to leave has two interpretations which give rise to the test to be applied. The first interpretation is that the employee could leave when the employers behaviour towards him was so unreasonable that he could not be expected to stay – this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment. This is the contractual tests.”**

On the guiding principles, the Court expressed itself as follows:

- a. What are the fundamental or essential terms of the contract?
- b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract?
- d. An objective test is to be applied in evaluating the employers conduct.
- e. There must be a causal link between the employers conduct and the reason for the employee terminating the contract i.e. causation must be proved.
- f. An employee may leave with or without notice so long as the employers conduct is the effective reason for termination.
- g. The employee must not have accepted, waived or acquiesced to the conduct himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied. In this case, the respondent accorded the claimants one(1) day to make a decision on the future of their employment. They had upto 12.00 noon on 3<sup>rd</sup> January, 2017, to make this far-reaching decision and the respondent was, according to the evidence on record impatient with their justifiable indecision. The act of chasing the claimants out of the work place by reason of their refusal to sign a new contract with Rene Superclean Services Limited amounted to a repudiatory breach of the contract of employment between the claimants and the respondent and thus a constructive dismissal.

Although the claimants sought no clarification from the human resource department or other place nor did they attempt to engage the respondent, the respondent’s conduct of forcing the claimants out of the compound for having refused to comply with its memo dated 2<sup>nd</sup> January, 2017 was unjustified and, in the Court’s, view amounted to unfair/unlawful termination of their employment contracts. The respondent should have reached out to them but did not bother even after the claimants instituted proceedings.

Based on the uncontroverted evidence of the eleven (11) claimants the Court finds and holds that their termination on 3<sup>rd</sup> January, 2017, was unfair for want of substantive and procedural fairness.

On reliefs, the claimants prayed for payment in lieu of notice, unpaid leave for the duration served, unpaid public holidays, damages for wrongful/unfair termination, house allowance for the duration served, unpaid overtime worked and certificate of service. However, not all claimants prayed for all the seven reliefs. The sample letters of appointment provided, for instance that of Martin Ndunda Muia, the 6<sup>th</sup> claimant reveal that he had a 3 months’ fixed term contract terminable by one week notice or payment in lieu of notice and all claimants had served for at least seven (7) months. The longest serving employee was the 11<sup>th</sup> claimant who had served for 6 years 7 months. For undisclosed reasons, majority of the claimants did not avail their appointment letters. In the absence of evidence to the contrary, it would



appear that the claimants were serving the respondent as term employees and were thus entitled to notice of termination.

The payslips on record show that the respondent was making NSSF contributions and some claimants availed the statements as evidence of employment by the respondent. None of the claimants furnished evidence that he/she had worked overtime and had not been paid or had worked on a public holiday and which one(s) in the course of employment by the respondent.

On house allowance, this is a statutory right of the employee as ordained by section 31 of the Employment Act. As aptly captured by the Court of Appeal in *Grain Pro Kenya Inc. Limited v= Andrew Waithaka Kiragu [2019] eKLR*, “***This was in accordance with section 31 (2) of the Employment Act which gives all employers three options, that is, to provide housing, pay house allowance or pay a consolidated salary.***” The payslips on record show that the respondent was paying the claimants basic salary only and no allowances, including house allowance which is a mandatory right. The Court finds that the eleven (11) claimants are entitled to house allowance for the duration served.

On leave allowance, the claimants led no evidence to prove their leave entitlement. The claim is declined.

Finally on damages for unlawful/unfair dismissal, all claimants prayed for the equivalent of 12 months’ gross salary without supportive evidence for the maximum award under section 49 (1) (c) of the Employment Act, 2007. As observed elsewhere in this Judgment, the eleven (11) claimants received the General Manager’s memo on 2<sup>nd</sup> January, 2017 and had to make their decision by 12.00 noon on 3<sup>rd</sup> January, 2017. The claimants provided no evidence that they took any proactive steps such as engaging the respondents’ General Manager or the Human Resource Department, or indeed anyone to ventilate their fears and concerns. They waited until the deadline passed. They could have presented a hand written petition or send a delegate(s) to voice their concerns to ameliorate situation. None of the claimants attached a copy of the agreement they declined to sign or allude to its terms in their standard witness statement.

In view of the foregoing, and the duration served by the eleven (11) claimants the equivalent of two months’ salary for those who had served for 2 years or more and one month for those who had served for a lesser period is sufficient in this case.

On the certificate of service, the Court finds that all the claimants are entitled to a certificate of service.

However, the claims by the 6<sup>th</sup> and 13<sup>th</sup> claimants are different from those of the eleven (11) claimants above.

#### **Martin Ndunda Muia**

The claimant was employed by the respondent as a housekeeper on 10<sup>th</sup> November, 2016 under a three months’ fixed term contract and was dismissed on 7<sup>th</sup> January, 2017, in what the letter described as current restructuring of the house keeping department and that his services were no longer required. The letter is dated 31<sup>st</sup> December, 2016. He worked for less than 2 months.

In his written statement, the claimant alleges that he was employed by the respondent on 5<sup>th</sup> December 2015 at a monthly salary of Kshs. 12,500 yet the letter of employment is dated 10<sup>th</sup> December, 2016 indicates that his salary was Kshs. 13,000 per month. His statement makes no reference to the termination on 7<sup>th</sup> January, 2017. The statement on record reads that he was terminated like the rest of the claimants. Whereas the letter of appointment states that the day shift is from 7.30 a.m. to 6.30 p.m., the statement states that he used to report to work at 6.00 a.m. and leave at 6.00 p.m. Noteworthy, the claimant did not attach a copy of the memo dated 2<sup>nd</sup> January, 2017.

Regrettably, the claimants witness Mr. Nicholas Kavoi Mutua did not testify on the facts presented by the 6<sup>th</sup> claimant who was dismissed on January 7<sup>th</sup>, 2017.

In light of the contradictory documentary evidence, provided by the 6<sup>th</sup> claimant, the claim for; -

- i. One month’s salary in lieu of notice Kshs. 12,500.
- ii. Unpaid / untaken leave for one (1) year Kshs. 12,500.
- iii. House allowance for the entire period of service Kshs. 22,500.
- iv. Unpaid overtime for one (1) year Kshs. 112,320.
- v. Unpaid / untaken public holidays Kshs. 9,166.
- vi. Damages for unlawful / unfair termination Kshs. 150,000.
- vii. Certificate of service.

Total claim **Kshs. 318,986**, the claim was not proved and is dismissed.

The claimant is entitled to a certificate of service.

#### **Kennedy Omwoso Olanda**

The 13<sup>th</sup> claimant, has another case in Court **ELRC Cause No. 1746 of 2017 Kennedy Omwoso Olanda -vs- Athi River Shalom Community Hospital**, fact that was not brought to the attention of the Court until the Notice of motion dated 27<sup>th</sup> September 2021 was filed. His claim in this case was withdrawn by his counsel on record.

In the final analysis Judgment is entered for the eleven (11) claimants as follows: -

**James Kioko Mwanthi – 1<sup>ST</sup> Claimant – (worked as cleaner)**

- i. One month's salary in lieu of notice ..... Ksh. 11,040.00.
- ii. Damages for unlawful/unfair termination calculated at  
2 months gross salary being  
(Kshs. 11,040 x 2 month) ..... Kshs. 22,080.

**Total claim ..... Kshs. 33,120.**

The claimant is also entitled for a certificate of service.

**Benson Mutuku Kioko – 2<sup>nd</sup> claimant - (worked as a cleaner)**

- i. One month's salary in lieu of notice ..... Kshs. 12,500.
- ii. House allowance for the entire period of service being  
(15/100 x 12,500) x 1 year) ..... Kshs. 22,500.
- iii. Damages for unlawful/unfair termination calculated at 1 (one) month gross salary being  
(Kshs. 12,500 x 1 month) ..... Kshs. 12,500.

**Total claim ..... Kshs. 47,600.**

The claimant is also entitled to for a certificate of service.

**Haron Muema Muasa – 3<sup>rd</sup> claimant - (worked as a cleaner)**

- i. One month's salary in lieu of notice ..... Kshs. 13,100.
- ii. House allowance for the entire period of service being  
(15/100 x 13,100 x 18 months being (1.5 years) ..... Kshs. 19,650.
- iii. Damages for unlawful/unfair termination calculated at 12 months gross salary being (Kshs. 13,100 x 2 months)  
..... Kshs.26,200.

**Total claim ..... Kshs. 58,950.**

The claimant is also entitled for a certificate of service.

**Onesmus Munwoki Kithiitu – 4<sup>th</sup> claimant - (worked as a cleaner)**

- i. One month's salary in lieu of notice ..... Kshs. 11,623.
- ii. House allowance for the entire period of service being  
(15/100 x 11,623 x 9 months) ..... Kshs. 15,691.
- iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being  
(Kshs. 11,623 x 2 months) ..... Kshs. 23,246.

**Total claim ..... Kshs. 50,560.**

The claimant is also entitled to a certificate of service.

**Jackton Marango Wafula – 5<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 14,500.

ii. House allowance for the entire period of service being

(15/100 x 14,500 x 12 x 4.5 years) ..... Kshs. 117,450.

iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being

(Kshs. 14,500 x 2 months) ..... Kshs.29,000.

**Total claim ..... Kshs. 160,950.**

The claimant is also entitled to a certificate of service.

**Martin Ndunda Muia – 6<sup>th</sup> claimant - (worked as a cleaner)**

Claim is dismissed.

**John Musumbi Wambua – 7<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 14,500.

ii. House allowance for the entire period of service being

(15/100 x 14,500 x 12 x 5 years) ..... Kshs. 130,500.

iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being (Kshs.14,500 x 2 months) ..... Kshs. 29,000.

**Total claim ..... Kshs. 174,000.**

The claimant is also entitled to a certificate of service.

**Felix Mutunga Munyiva – 8<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 14,000.

ii. House allowance for the entire period of service being

(15/100 x 14,000 x 12 x 3 years 6 months) .... Kshs. 88,200.

iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being Kshs. 14,000 x 2 months).... Kshs. 28,000.

**Total claim ..... Kshs. 130,000.**

The claimant is also entitled to a certificate of service.

**Justus Kioko Kisila – 9<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 14,500.

ii. House allowance for the entire period of service being

(15/100 x 14,500 x 12 x 4 years 1 month ..... Kshs. 104,400.

iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being

(Kshs. 14,500 x 2 months Kshs. .... 29,000.

**Total claim ..... Kshs. 147,500.**

The claimant is also entitled to a certificate of service.

**Nicholas Kavoi Mutua – 10<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 15,000.

ii. House allowance for the entire period of service being

(15/100 x 15,000 x 12 months x 6 years) ... Kshs. 162,000.

iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being

(Kshs. 15,000 x 2 months) ..... Kshs. 30,000.

**Total claim ..... Kshs. 207,000.**

The claimant is also entitled to a certificate of service.

**Jannefer Ngina Komu – 11<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 15,000.

ii. House allowance for the entire period of service being

(15/100 x 15,000 x 12 months x 6.5 years)..Kshs. 175,500.

iii. Damages for unlawful/unfair termination calculated at 2 months gross salary being

(Kshs. 15,000 x 2 months) ..... Kshs. 30,000.

**Total claim ..... Kshs. 220,000.**

The claimant is also entitled to a certificate of service.

**Onesmus Mutuku Kivula – 12<sup>th</sup> claimant - (worked as a cleaner)**

i. One month's salary in lieu of notice ..... Kshs. 11,610.

ii. House allowance for the entire period of service being

(15/100 x 11,610 x 11 months) ..... Kshs. 19,156.

iii. Damages for unlawful/unfair termination calculated at 1 month gross salary being

(Kshs. 11,610 x 1 month) ..... Kshs. 11,610.

**Total claim ..... Kshs. 42,376.**

The claimant is also entitled to a certificate of service.

In the final analysis Judgment is entered for the 11 claimants as indicated above with costs of this suit.

Interest at Court rates till payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

**DR. JACOB GAKERI**

**JUDGE**

Delivered in presence of:

Upendo (holding brief) for Mr. Namanda for the claimant.

Omari for the respondent.