



**Kenya Union of Sugar Plantation and Allied Workers v West Kenya
Sugar Company Limited (Employment and Labour Relations Cause
5 of 2023) [2023] KEELRC 2205 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2205 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 5 OF 2023**

**JW KELL, J
SEPTEMBER 22, 2023**

BETWEEN

**KENYA UNION OF SUGAR PLANTATION AND ALLIED
WORKERS APPELLANT**

AND

WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Laws of Kenya to represent workers in sugar plantation and related industries.
2. The Claimant on 3rd July 2018 filed the Statement of Claim dated 2nd July 2018 on behalf of three grievants supported by the Supporting affidavit of even date sworn by the General Secretary of the Claimant Mr. Francis B. Wangara at Kisumu.
3. The suit had been triggered by the termination of the employment by the Respondent of the grievants Joan Jebichii as Data Entry operator Moses Anaswa as Harvesting Clerk and Cquelien Wanambisi as Weighbridge Clerk. Vide the Memorandum of Claim, the Claimant had prayed for the following reliefs:
 1. A declaration be made to the effect that, the summary dismissal of the above employees was wrongful, unlawful, unprocedural and unfair.
 2. All the above aggrieved employees are reinstated back on duty without loss of benefits from the date of dismissal.
That alternatively they be compensated as follows:-
 3. Compensation for the 1st Grievant Miss Joan Jebichii as follows:-



- a. Maximum compensation of 12 month gross salary for unlawful loss of employment
12 months x Kshs. 33,773.35= Kshs. 405, 280.20
- b. Payment of Annual leave for the year 2014 as per C.B.A clause 16
30 days(28,031 x 12) X8 hrs/2496 = 32,343.45
- c. Accrued payments of half pay while on unlawful suspension. (C.B.A clause 8 iif).
September 2016 (28,031- 10,242.15) Kshs. 17, 788.85
October 2016 (28,031- 16,171.80) Kshs. 11, 859.20
Total=Kshs. 29,648.05
- d. Payment in lieu of notice of termination having served for 11 years as per clause 9 c
of the C.B.A i.e.
3 month x 28,031 = Kshs. 84,093
- e. 15days service pay for each year worked for 11 years
15 days (28,031 x 12x8)/2496 x11 years=Kshs. 177,889.00
- f. Compensation for psychological damages and injured feelings . Kshs. 3,000,000.0
Total of Kshs. 3,729,253.70

Claim Compensation for the 3rd Grievant Mr. Moses Anaswa as follows:-

- a. Maximum compensation of 12 month gross salary for unlawful loss of employment
12 months x Kshs. 32,236.00= Kshs. 386,832.00
- b. Payment of Annual leave for the year 2014 as per C.B.A clause 16
42 days(28,031 x 12)/2496 X8 hrs = 45,280.85
- c. Accrued payments of half pay while on unlawful suspension. (C.B.A clause 8 iif).
September 2016 (28,031- 10,242.15) Kshs. 17, 788.85
October 2016 (28,031- 16,171.80) Kshs. 11, 859.20
Total=Kshs. 29,648.05
- d. Payment in lieu of notice of termination having served for 24 years as per clause 9 c
of the C.B.A i.e.
3 month x 28,031 = Kshs. 84,093
- e. 15days service pay for each year worked for 24 years
15 days (28,031 x 12x8)2496/2496 x 24 years=Kshs. 388,121.50
- f. Compensation for psychological damages and injured feelings . Kshs. 3,000,000.0
Total of Kshs. 3,849,882.40

Compensation of the 2nd Grievant Miss Cquelien Wanambisi as follows:-

That she worked as a weighbridge clerk UG 02 in the CBA whose basic salary is Kshs. 20,916 and house allowance of 15% which is Kshs. 3,137.40)

- a. Maximum compensation of 12 month gross salary for unlawful loss of employment



12 months x Kshs. 24,053.40= Kshs. 288,640.80

- b. Payment of accrued Annual leave from date of employment 2008 to 2016) for 8 years as per C.B.A clause 16

28 days(per year for 8 years = 224

Daily rate(20,916 x 12)/2496 X8 hrs = 804.50

224 days x 804.50= Kshs. 180,208.00

- c. Accrued payments for public Holidays for the 8 years worked.

Daily rate (20916x 12)/2496 x8hrs = Kshs. 804.50

Ten public holidays per year 10 x 804.50= 8,045.00

Total pay for 8 years 8 x 8,045.00 = Kshs. 64,360.00

- d. House allowance for 8 years worked

The C.B.A Clause 22 provides for house allowance at the rate of 15% of the Basic Salary

Thus basic salary of 20,916 x 15% = 3,137.40 per month

12 months x 3,137.40 = Kshs. 37,648.80 per year

House allowance for the period of service(8) years

8 years x Kshs. 37,648.80 = Kshs. 301,190.40

- e. Payment in lieu of notice of termination having served for 8 years as per clause 9 b of the C.B.A i.e.

2 month x 20,916.00 = Kshs. 41,832.00

- f. 15days service pay for each year worked (she worked for 8 years) as she was not entitled to provident fund.

Daily rate (20,916 x 12)/2496 x 8hrs =Kshs. 804.50

Per Year worked. Kshs. 804.50 x 15 days = Kshs. 12,067.50

For 8 years 12,067.50 x 8 years = Kshs. 96,540.00

- g. Payment of arrears arising from salary underpayment for the 8 years

Monthly Salary Under Payment Of Kshs. 20,916-13,624= Kshs. 7,292.00

8 years x 12 months x 7,292= Kshs. 700,032.00

- h. Compensation for psychological damages and injured feelings . Kshs. 2,000,000.0

Total of Kshs. 3,672,802.40

- i. That all Grievants be issued with certificate of service.

4. Also filed in this suit are the Claimant's documents filed together with the Memorandum of Claim on 3rd July 2018 (comprising of various documents that were eventually adopted by the court as Claimant's Exhibits and the Claimant's members Joan Jebichii , Moses Anaswa and Cquelien Wanambisi witness statements all undated except that of Moses Anaswa which was dated 11th November 2021 and filed on 12th November 2021. The Claimant on 23rd May 2022 filed a list of



Additional documents dated 20th May 2022 accompanied by further documents that were eventually adopted by the court as the Claimant's additional documents. One Document (DCI Report) was expunged from the record of the Claimant's documents filed on 3rd July 2018.

5. The claim was opposed. The Respondent on 11th December 2018 filed a Memorandum of Response dated 10/12/2018 accompanied by documents that were eventually adopted by the court as the Respondent's Exhibits and a Statement of Duncan Abwao dated 10th February 2022. The respondent on 23rd May 2022 filed a list of Supplementary documents dated 20th May 2022 accompanied by further documents that were eventually adopted by the court as the Respondent's Supplementary documents.
6. By an order of 5th October 2021, Justice Radido had transferred this matter filed as Cause No. 243 of 2018 from Kisumu to Bungoma and subsequently by an order dated 20th April 2023, this matter previously filed at Bungoma as Cause No. 62 of 2021 was transferred to Kakamega for hearing and determination.

Hearing and Evidence

Grievants Joan Jebichii, Moses Anaswa and Cquelien Wanambisi.

CW1 Joan Jebichii

7. Joan Jebichii(CW1) was heard orally on the 23rd May 2022 when she testified as the Claimant's first witness of fact in her case, produced her evidence as the claim filed, the claimant's list of documents filed on 3rd July 2018 (comprising of various documents that were eventually adopted by the court as her Exhibits and her witness statement filed on 12th November 2021).
8. CW1 was cross-examined by the counsel for the respondent, Mr. Andiwo.

CW2 Cquelien Wanambisi

9. Cquelien Wanambisi(CW2) was heard orally on the 14th February 2023 when she testified as the Claimant's Second witness of fact in her case, produced her evidence as the claim filed, the claimant's documents filed on 3rd July 2018 and the additional documents field on 23rd May 2022 as per list of documents dated 20th May 2022 (comprising of various documents that were eventually adopted by the court as her Exhibits and her witness statement filed on 12th November 2021).
10. CW2 was cross-examined by the counsel for the respondent, Mr. Andiwo.

CW3 Moses Anaswa

11. Moses Anaswa(CW3) was heard orally on the 14th February 2023 when he testified as the Claimant's Third witness of fact in his case, produced his evidence as the claim filed, the claimant's documents filed on 3rd July 2018 and the additional documents filed on 23rd May 2022 as per list of documents dated 20th May 2022 (comprising of various documents that were eventually adopted by the court as his Exhibits and his witness statement dated 11th November 2021 and filed on 12th November 2021).
12. CW3 was cross-examined by the counsel for the respondent, Mr. Andiwo.
13. The Respondent's case was heard on the 8th March 2023 where its witness Duncan Abwao (DW1) testified on oath as the Respondent's witness of fact and adopted his written witness statement dated 10th February 2022 as defence evidence in chief, and produced defence documents as the respondents' list of documents filed on 11th December 2018 and the additional documents filed on 23rd May 2022



(comprising of various documents that were eventually adopted by the court as its Exhibits (C-Exh-1 to 19A) per list of documents dated 20th May 2022) .

14. DW1 was cross-examined by Claimant's Representative, Jeremiah Ingalia Akhonya

Claimant's case in summary

Joan Jebichii,(CW1) Moses Anaswa (CW3) and Cquelien Wanambisi(CW2).__

15. CW1 told the court she was a Data Entry Operator employed in the year 2006 earning a monthly gross salary of Kshs. 33,773.50(C-Exh-3a), until she received a complaint letter on 25th August 2016 accusing her of demanding for a bribe from farmers and issuing harvesting permits to brokers which facilitated exploitation of farmers. She replied denying the allegation in her letter of 31st August 2016(C-Exh- 4(a)). She was summoned to the Human Resource Office on 1st September 2016 when she was issued with the Suspension letter dated 1st September 2016(C-Exh-5(a)). The Union before the lapse of the suspension written to the respondent on 23rd September 2016(C-Exh-7(b)) to adhere to adhere to suspension guidelines as per C.B.A(C-Exh-1) and the same was ignored by the respondent. The Claimant argues that the suspension was further extended on 30th September 2016 (C-Exh-6(a)) beyond the stipulated timelines in breach of the Recognition Agreement and C.B.A(C-Exh 1 & C-Exh 2) provisions without agreeing with the Claimant union. The Claimant Union wrote to the respondent on 4th October 2016(C-Exh-7(a)) protesting any further extension and requested reinstatement of CW1. CW1 reported to work on 21st October 2016, when she was sent on an 18 days' compulsory leave(C-Exh-8a) and reported back on 11th November 2016 when she was redeployed as a General clerk in the accounts section to issue statements to farmers. On 3rd February 2017, she was directed to record a statement with the DCIO at Malava police station relating to the operations in the sugar fields. CW1 was then summarily dismissed on 23rd February 2017(C-Exh-10(a)).
16. CW1 argues that she was wrongfully, unfairly and unprocedurally dismissed having been subjected to double punishment by virtue of having been suspended and dismissed after reinstatement contrary to Articles 41(1), 47(1) and 50(1)(2) a, b, c, j & k of the *Constitution*. She argues that given no show cause letter or notice was issued to her, she was not accorded a hearing as per sections 41, 43 and 44 of the *Employment Act*, 2007.

CW2 Cquelien Wanambisi

17. CW2 told the court she was initially employed as a Casual Junior clerk in July 2008 and enrolled for NSSF in June 2009. She was issued with a monthly term contract in the year 2009(C-Exhibit 12) as a Junior clerk UG 01 but assigned as a weighbridge clerk UG 02 earning a daily rate of Kshs. 381.30 which she states was below the C.B.A Rate at Clause 12(c) of a Daily rate of Kshs. 804.50(C-Exh-13).That she was summoned to the Human Resource Office and verbally dismissed on 1st September 2016 without reason. She had joined the union on 30th January 2016(C-Exh-14) and was paying her union dues directly as per section 52 of the *labour relations Act*, 2007. CW2 states she was never given her pay statements as per section 20 of the *Employment Act*, 2007 and the C.B.A. That she was employed on terms far below those set out in the C.B.A and was thus discriminated upon. That she wrote to the respondent seeking reasons for her termination but did not receive any response(C-exhibit 7(a)7(b) & 7(c)-(Letters from the Union). That the Respondent failed to adhere to the recognition Agreement and she was denied her basic employment rights of Annual leave, house allowance, minimum wages(clause 34 of CBA), annual wage increments as per C.B.A overtime pay for public holidays, itemised pay statements, sick leave, termination notice, conversion of casual to term contract, notification and hearing before termination. That she earned a monthly salary of Kshs. 13,624.00 which was below



what her colleagues received of Kshs. 20,916.00, an underpayment of Kshs. 7,292 per month. That the respondent's actions contravened sections 41, 43, 44 and 45 of the [Employment Act](#).

CW3 Moses Anaswa

18. CW3 was a Harvesting Clerk employed on 1/06/1992 earning a monthly gross salary of Kshs. 32,236.00(C-Exh-3b), until he received a complaint letter on 25th August 2016 accusing him of demanding for bribes from farmers and issuing harvesting permits to brokers which facilitated exploitation of farmers. He replied denying the allegation in his letter of 1st September 2016(C-Exh-4(b)). He was summoned to the Human Resource Office on 1st September, 2016 when he was issued with the Suspension letter dated 1st September 2016(C-Exh-5(b)). The Union before the lapse of the suspension wrote to the respondent on 23rd September 2016(C-Exh-7(b)) to adhere to suspension guidelines as per C.B.A(C-Exh-1) and the request was ignored by the respondent. The Claimant argues that the suspension was further extended on 30th September 2016 (C-Exh-6(a)) beyond the stipulated timelines in breach of the Recognition Agreement and C.B.A(C-Exh 1 & C-Exh 2) provisions without agreeing with the Claimant union. The Claimant Union wrote to the respondent on 4th October 2016(C-Exh-7(a)) protesting any further extension and requested reinstatement of CW3. CW3 reported to work on 21st October 2016, when he was sent on an 18 days' compulsory leave(C-Exh-8b) and reported back on 11th November 2016 when he was redeployed as a Field Assistant in Mwela Sub-Location. On 3rd February 2017(C-Exh-9), he was directed to record a statement with the DCIO at Malava police station relating to the operations in the sugar fields. CW3 was then summarily dismissed on 23rd February 2017(C-Exh-10(b)) CW3 argues that he was wrongfully, unfairly and unprocedurally dismissed having being subjected to double punishment by virtue of having been suspended and dismissed after reinstatement contrary to Articles 41(1), 47(1) and 50(1)(2) a, b, c, j& k of the [Constitution](#). He argues that given no show cause letter or notice was issued to him, he was not accorded a hearing as per Sections 41, 43 and 44 of the [Employment Act](#), 2007.

The Respondents' case

19. The Respondent's case is that in June 2016 during a Public baraza with farmers, an issue of corruption was raised emanating from the accounts and Agricultural departments. That due to fear of intimidation and noting that the perpetrators of the alleged corruption were from the community and non-cooperation from staff, the Respondent was unable to pin point the culprits. The Respondent allegedly began an overhaul of the two departments and many employees resigned. The Respondent therefore suspended the employees that had not resigned for investigations.

Joan Jebichii(CW1)

20. As regards Joan Jebichii(CW1), the Respondent confirmed she was employed as a Data Entry operator 1 from 1st May 2009 and was served with a show cause letter on 25th August 2016 on allegations of gross misconduct emanating from demanding for bribes and issuance of cane harvesting permits to brokers who in turn exploited farmers and which she replied to on 31st August 2016(R-Ehibit-1A). That CW1 was suspended on September 1st 2016 to pave way for investigations and the period lapsed before investigation were completed that led to the extension of the suspension by 21 days for further investigations(R-Exh- 1B). That she was invited for disciplinary hearing on 17th February 2017 and minutes recorded(R-Exh-1C) and eventually summarily terminated on 23rd February 2017(R-Exh-1D). CW1 filed her appeals on 27th February 2017 and 6th May 2017(R-EXH-1E) and she appeared before an appeals committee on 1st July 2017 which upheld her dismissal. The respondent stated that CW1 did not clear and her final dues remain uncollected.



Cquelien Wanambisi(CW2)

21. The respondent stated that CW2 was engaged as a piece rate employee as a Junior clerk and her daily earnings depended on the quantity delivered on each day. That the Weighbridge had been one of the areas mentioned during the public baraza as a Corruption zone, and CW2 like her other colleagues who opted not to report to work due to the investigations , she left her employment.

Moses Anaswa(CW3)

22. The respondent stated that Moses Anaswa(CW3) was employed as an Agriculture Statistician clerk in the agriculture department vide the contract of 1st August 2001(R-EXH-2A). That he was on 5th May 2008 paid his final dues of Kshs. 48,324.00 as his final settlement up to 30th April 2008 and a clearance certificate acknowledging the sum issued. That on 1st March 2012 he was employed as a General Clerk II. CW3 was served with a show cause letter on 25th August 2016 on allegations of gross misconduct emanating from demanding for bribes and issues cane harvesting permits to brokers who in turn exploited farmers and to which he replied to on 1st September 2016(R-Ehibit-2B). He was suspended on September 1st 2016 to pave way for investigations and the period lapsed before investigations were completed that led to the extension of the suspension by 21 days for further investigations(R-Exh- 2B). That he was invited for disciplinary hearing on 17th February 2017 an minutes recorded(R-Exh-2C) and eventually summarily terminated On 23rd February 2017(R-Exh- 2D). the CW3 filed his appeal on 28th February 2017 (R-Exh-2E) and he appeared before an appeals committee on 1st July 2017, which upheld his dismissal. The respondent stated that CW3 did not clear and his final dues remain uncollected.
23. The Respondent submits that the Grievants(CW1& CW3) were given an opportunity to exonerate themselves during their hearing but they could not do so; showed no remorse, and interfered with investigations to thwart the respondent's efforts to get to the root of the corruption allegations. That the Grievants were duly dismissed for gross misconduct per the C.B.A and the Employment Act, 2007 and are not entitled to the claim for s sought.

Written submissions

24. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions dated 10th April 2023 were drawn by the Claimant's Representative Jeremiah Ingalia Akhonya and filed on 12th April 2023. The Respondent's written submissions dated 26th May 2023 were drawn by O& M Law LLP Advocates and filed on 29th May 2023.

Determination

Issues for determination.

25. The Claimant did not identify issues for determination in its written submissions and the court shall infer from the submissions.
26. The Respondent in its written submissions identified the following issues for determination:-
- a. Whether the 1st & 2nd Grievants were summarily dismissed for justifiable reasons.
 - b. Whether the Respondent adopted a lawful procedure before dismissing the 1st & 2nd Grievants.
 - c. Whether the 3rd grievant was terminated /dismissed by the Respondent



- d. Whether the Grievants are entitled to the prayers sought.
27. The Court having considered the issues addressed by the parties in their submissions and pleadings were of the considered opinion that the question of whether the Grievants (CW1 , CW2 AND CW3) were former employees of the respondent was not in dispute. The issue for the court addition was whether the claimant had locus standi to represent them in court. Thus the issues to be addressed in the determination of the dispute were as follows:-
- a. Whether the claimant had locus standi to represent the employees in court.
- b. Whether the termination of employment of the Grievants by the respondent was lawful and fair.
- c. Whether the Grievants are entitled to the reliefs sought.

Issue a. Whether the claimant had locus standi to represent the employees in court.

28. The court wishes to address this issue as the claimant’s representation court is not open ended. The claimant appeared to submit that it can represent all unionisable workers of the respondent under clause 2a of the recognition agreement. The court wishes to remind the union that its representation of employees in court is limited to membership as held by justice Rika in *Kenya Hotels and Allied Workers Union v Diani Sea Resort T/A Carslake Nominee Limited* (2015)e KLR who interpreted the representation by the union as follows:-
- ‘ 6. Legal representation of individual Employees in Court and other Dispute Resolution Platforms is an obligation of the Trade Union, imposed by the Trade Union Constitution. It is a right of the Employee, which flows from his individual Membership of a Trade Union, normally guaranteed through the Trade Union Constitution. It is an aspect of the right to associate under the *Constitution* of Kenya.
7. Section 22 of the Industrial Court Act 2011 grants Trade Union Representatives the right to represent their Members in Court.’ The claimant must prove at all times the person they bring as grievants are their members. The recognition agreement cannot give the union rights to represent all workers in court as that would be outside the law. The union can only represent its members in this court. I have perused the memorandum of response and the statement of DW and found the membership was not challenged. The issue of locus in the instant case is thus undisputed.

Issue b. Whether the termination of employment of the claimant by the respondents was lawful and fair.

29. The court in determination of the issue was guided by the provisions of section 45 of the *Employment Act* which states:-
- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—



- (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

Substantive fairness- validity of the reason

Claimant's case

CW1- Joan Jebichii

30. On the validity of the reasons for the termination of the employment, CW1 submits that her termination was unfair as allegations levelled against her of having colluded with field staff to issue harvesting permits to brokers; soliciting money and favour before issuing harvesting permits and causing genuine farmers to fail to harvest their mature sugarcanes were untrue. CW1 submitted that no single permit was produced in court evidencing that she had issued a permit to a broker nor did any farmer come forward complaining having not been issued with a permit by her.
31. CW1 submitted that DW1 had testified that she was involved in the registration section where, as a data entry operator, she could only input data of shortlisted farmers who had been identified by the field agents through the permitting shortlist form(C-Exh-19A), and in no way was she involved in issuing permits which after generation by another section were given to the Agriculture administrative manager for checking and onward issuance to Field supervisors and assistants who undertook the issuance of permits.
32. CW1 submits that she was not in collaboration with field staff in any way that could interfere with issuance of permits and stated that monies alleged by the respondent to have been from brokers was money received from a Merry-Go round from her colleagues and money received from her friends. CW1 submitted that the respondent did not produce any policy in relation to the permit issuance that CW1 had violated and nor did any genuine farmer or contracted farmer allege that due to CW1's actions, they had failed to harvest their mature canes. CW1 maintained that she did not interact with farmers and shortlisting of farmers for permits was done by field staff. CW1 submits that the Respondent did not have reason to terminate her employment and all the allegations pointed out in the complaint's Letter(C-Exh-5(a)) could not be ascertained as no evidence from any farmer was produced.

CW2- Cqueliem Wanambisi

33. CW2 submitted that she was verbally suspended in September 2016 and subsequently summarily dismissed without reason. CW2 submits that the allegations by DW1 that she absconded duties after the Weighbridge Department was flagged as one of the corruption zones was unfounded as no single evidence was produced in court to the effect that the Respondent raised the issue of absconding with CW2 as is required. CW2 submits that she was suspended verbally and was never called back to work.

CW3-Moses Anaswa

34. CW3 submits that his termination was unfair as no evidence was produced in court evidencing that the normal process relating to permit issuance was flouted. CW3 submitted that no single farmer adduced evidence to allege having not received their harvesting permits due to CW3's fault at the



least. CW3 submitted that DW1 adduced evidence based on records only but not a true account as he had not been in the employ of the Respondent at the material time of the suspension and could not therefore ascertain, whether the farmers had raised complaints, which managers had attended the public baraza and within which area the public baraza alleged to have led to the suspension had been held.

35. CW3 submits that the management maliciously formulated allegations against the Grievants based on hearsay evidence. CW3 submits that the permitting process from the permit shortlisting form(C-Exh-19A)was followed to the letter and that no evidence showed that the permitting process was by-passed. CW3 submits that no single permit was produced that is alleged to have been issued to a broker nor a name of any broker submitted in court to support the Respondent’s allegations. That additionally no farmer complained having not been issued with a permit. CW3 submitted that DW1 testified that he was involved in permit generation not the permit issuance which was a reserve of the administrative managers and field supervisors and assistants and CW3 did not therefore interact with farmers .
36. CW3 argues that DW1 confirmed that the clerks working under him printed permits that correspond to the Permitting shortlist form(C-Exh-19A) and no record to the contract was produced. CW3 submits that issues of bribery could not stand as none of his clerks nor him delayed any permit generation and allegations that farmers feared naming the grievant as they came from their locality were unsubstantiated as DW1 during hearing could not point out to the Grievants residential areas nor where the farmers had raised their complaints. CW3 submits that the Respondent relied on hearsay to terminate his employment and the allegations that police investigations were compromised could not be relied on without proof.

Respondent’s Case

37. The Respondent affirms that the Grievants were terminated lawfully under section 44 of the [Employment Act](#). The Respondent affirms that CW1 & CW3 were accused of receiving bribes which amounts to gross misconduct. The Respondent highlighted sections 44(4)(d) and section 44(4)(g) below to assert its position.

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

.....

- (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;

.....

- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”



38. The Respondent relied on the case of *Cynthia Kuvochi Luyegu & 6 others Vs Tourism Promotion Services limited & Another* (2006) eKLR where Justice Mugo held “Examples of gross misconduct include theft or fraud, physical violence or bullying deliberate and serious damage to property, serious misuse of organization’s property or name, deliberately accessing internet sites containing pornographic, offensive or obscene material, serious insubordination unlawful discrimination or harassment, bringing the organization to serious disrepute, serious incapacity at work brought on by alcohol or illegal drugs, causing loss damage or injury through serious negligence, a serious breach of health and safety rules and serious breach of confidence.” Further it relied on *Peter Ontere Nyamira v Mutburwa Girls Secondary School* (2018) eKLR where the court held “for termination of employment to pass the fairness test, there must be both substantive and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in affecting the termination.”
39. The Respondent affirmed that both CW1 & CW3 had been issued with complaint letters that pointed to the fact that the two Grievants had solicited for bribes in order to issue permits to farmers or permits issued to brokers. The respondent submits that they had received anonymous complaints that indicated various persons were receiving bribes in the agriculture department and when farmers were asked to name specific individuals they declined in fear of victimization, which led the respondent to report to the DCI for further investigations. The respondents submits that CW1 & CW3 were questioned about transactions in their M-pesa statements which were “high Value” transactions that as for CW1 involved field staff and her answer that the same amounts were for a merry-go round and money from selling Sacco T-shirts, and that most of the field agents were dismissed in the alleged corruption and bribery scandal. As regards CW3, the Respondent submitted that CW3 on receiving his complaint letter alleged that he performed his duty of printing permits in accordance with data input by CW1. The respondent submitted that CW3 was questioned on the nature of transactions with two field assistants (Godfrey Mukanzi & Everline Masayi) and one Farmer (Mr. Emmanuel Akal), and his responses were that he had purchased farm equipment for Mr. Ekal and paid on his behalf his farm workers and as for Mr. Mukanzi they had a lease partnership and grew cane together and Mr. Mukanzi had borrowed and refunded money to him in installments. As to Everline, she had borrowed him money and she was paying the same through Mpesa. The Respondent asked this court to consider the alleged ledger analysis and Mpesa statements produced in the Respondent’s Supplementary Bundle of documents to ascertain that the transactions as compared to CW1’s & CW3’s pay slips did not show genuine transactions even with the reasons that CW1 and CW3 had given during the disciplinary hearing and in light of the fact that they were dealing with field assistants and farmers.
40. The Respondent asserts that the disciplinary proceedings by an employer are not subjected to the same test as of a criminal trial and where trust is broken the employer can reasonably dismiss an employee. To buttress this assertion the Respondent relied on the cases of *Michael Njoroge Mugo v Laikipia University* (2018) eKLR and *Judicial Service Commission v Gladys Boss Shollei & Another* (2014) eKLR.
41. As for CW2, the Respondent submits that CW2 failed to adduce evidence that she was even an employee of the Respondent and whether she was unlawfully terminated without any proof. The respondent urged that even when the employer is required to keep record of its employees, an employee must prove this nexus and ask for the employer to produce documents to prove her employment. The respondent relied on various cases to argue that CW3 was not an employee of the Respondent at the alleged period. They included: *Casmir Nyakundi Nyaberi V Mwakikar Agencies limited* (2016) eKLR; *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR;



Decision on substantive fairness

42. The burden of proof of the validity of reasons for termination lies with the employer under section 43 of the [Employment Act](#) which reads:-
- ‘43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
43. In the instant case the dismissal of CW1 was pegged on the allegation that she had colluded with Agriculture department field staff “in facilitating issuance of cane harvesting permits to unregistered or uncontracted persons against the company permit issuance rules and regulations. The fraudulent deals denied the genuine and contracted farmers a chance to harvest their mature cane in time,” (R-Exhibit- 1D).
44. What the court needs to determine is whether the dismissal decision met the reasonable test where Lord Denning in *British Ryeland UK Limited v Swift*(1981)I.R.L.R 91 held that:-
- ‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...’
45. DW1 told the court during cross-examination that no farmer had alleged that CW1 had failed to issue permits nor did the farmers complain that the permits issued had any errors from the data input by CW1. DW1 confirmed that no person had received a permit without having been shortlisted by the field agents and there was no record that a broker had received a permit. DW1 when asked during cross-examination to confirm whether investigations had established the nature of Mpesa transactions CW1 had with various persons and which among the said transactions was bribery or corruption money, DW1 stated in the negative that the same had not been ascertained and allegedly that CW1 failed to rebut the allegation by producing her own Mpesa statement. When asked whether the Respondent controlled how its employees used their money DW1 affirmed that the company did not do so.
46. During the disciplinary proceedings whose minutes were produced as (R-Exh-1C) , the Respondent sought clarification from CW1 on the relationship she had with various persons and the nature of her Mpesa transactions with her. Among persons alleged to have send money to CW1 was her Husband Milton Maunda, her colleagues being Field Assistants (Ms.Carren Kitiavi, Aggrey Lunalo, George Wangila , Godfrey Mukanzi, John Pwoka, Joseph Okumu) and, Victor Masolia who CW1 stated was a friend to her first boyfriend. CW1 gave evidence that her transactions with the field assistants arose from a Merry-go round they had and as a member of Wekscol Sacco, she had been given 52 Sacco T-shirts to sell and all transactions among the field assistants thereof emanated from either the sale of the Sacco t-shirts, or Merry-go round. The Respondent sought details of the amount contributed for the merry-go round which she replied was Kshs. 2,000 per person monthly. At the disciplinary proceedings



CW1 sought reasons why she had been hand-picked among many clerks and she was informed that it was because of the many transactions on her account.

47. From the foregoing, account, the Respondent did not have any concrete evidence that linked CW1 to any accusations of bribery in process of issuance of harvest permits but only relied on the fact that she had many Mpesa transactions with some of her colleagues and friends. The Respondent produced what it termed as Ledger Analysis and M-pesa statements belonging to CW1 that had no details from where they had been obtained. The law governing production of print outs is section 65(8) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides:-

“In any proceedings under this Act where it is desired to give a computer print- out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

- (a) Identifying a document containing a print-out or statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by the computer;
- (d) dealing with any of the matters to which conditions mentioned in subsection (6) relate.

Which is certified by a person holding a responsibility position in relation to the operation of the relevant device or the management of the activities which the document relates in the ordinary course of business shall be admissible in evidence.”

48. The print-out information provided by the Respondent bore no record of where the information had been obtained and how the same had been obtained. No certificate was produced as required under Section 65(8) of the *Evidence Act*, and with the Mpesa transaction having been the only nexus of CW1 to the bribery allegations, the evidence thereof should have complied with the law on admissibility.

“The court in *Alex Ngoko v Republic* [2015] eKLR held:- “We have reviewed the proceedings and it is clear that neither the prosecution nor the learned magistrate paid attention to the admissibility of the statements and the need to comply with the provisions of section 65(8) of the *Evidence Act*. The certificate required by the Act was not produced. In *Charles Matu Mburu v Republic* NYR CA Crim App. No. 34 of 2014 [2014]eKLR, the Court of Appeal, in similar circumstances, observed that;-In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased’s mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant’s submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.” In our assessment the case against the appellant could not be proved without production of the computer generated statements of account from Safaricom connecting the complainant’s Mpesa agency account, the account in the name of Thomas Gichana and the accounts of PW 3 and PW 4. In the absence of such statements, no connection could be made between the robbery of 24th January 2013 and the appellant.”

49. Though CW1 did not raise any issue relating to the truthfulness of the Mpesa transactions produced by the respondent, there was no record of when the alleged Mpesa statement was obtained. The



Respondent alleged in its disciplinary meeting held on 17th February 2017 that CW1's Mpesa transactions are what led to suspicions toward CW1 of her involvement in corruption. The respondent investigations of bribery did not stipulate what period the alleged bribery incidences had been going on. There was no record from farmers of when the bribery had been undertaken. The court finds that CW1 gave reasonable account of the sources of the monies to her M-pesa. The respondent informed the court CW1 recorded statement at the police. The report of the police investigation was expunged at the objection by the respondent. The court will never know the outcome of the police investigation and it is not farfetched to draw inference the report was in favour of the employees.

50. The Respondent picked on CW1 due to her alleged Mpesa transactions volume and no evidence at all was produced linking her to the bribery on balance of probabilities. For that, I am convinced that the reason for the summary dismissal of the CW1 was not justified in the circumstances.

CW2- Cquelien Wanambisi

51. At submissions, the Respondent alleged that CW2 was not an employee, that she had not proved to have been unlawfully terminated or employed by it.
52. DW1 during cross-examination was asked various questions and he answered as shown below.

Akhonya: In your statement paragraph 8 there are staff who resigned after allegations?

DW1: yes

Akhonya: Do you have names of staff who left?

DW1: No

Akhonya: Any name of staff who absconded?

DW1: Wanambisi

Akhonya: Apart from Wanambisi any other or list?

DW1: No.

.....

Akhonya: What was work of Wanambisi?

DW1: Weighbridge Clerk

Akhonya: What is s the work of weighbridge clerk

DW1: To weigh the empty equipment Motor vehicle and Cargo Motor vehicle and generate weightment slips thereof.

Akhonya: Was Wanambisi in the agriculture department

DW1: No

Akhonya: Any record of Wanambisi being involved in permitting?

DW1: No

Akhonya: Did this case of Moses and Joan Involve Wanambisi

Akhonya: how was Wanambisi involved?

DW1: The first stop of trucks from the field is the



weighbridge?

.....

Akhonya: Who does she report to

DW1: Weighbridge in charge

Akhonya: Any record by weighbridge in charge that

Wanambisi weighed the trucks in wrong

way??

DW1: No. the issue was absconding duty.

Akhonya: any record that Wanambisi absconded duty?

DW1: she was on piece meal duties with start and end dates

Re-Exam

DW1: Wanambisi was a junior clerk working in the Weighbridge.

53. It was clear from DW1 that CW2 was an employee of the Respondent and her termination having been done verbally there was no record of reasons of her suspension. DW1 confirmed that Wanambisi had allegedly absconded work as the bribery investigations also involved the Weighbridge section where she was stationed, although no record of what bribery claims had been levelled against Wanambisi were produced. It is the burden of the employer to prove reasons for the termination under section 43 of the *Employment Act*. DW1 alleged CW2 absconded duty but did not produce any prove of the same. He alleges must prove.
54. Relying on the authority relied on by the Respondent *Casmir Nyakundi Nyaberi V Mwakikar Agencies limited* (2016) eKLR; the court held:- “This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”
55. DW1 affirmed that the CW2 was on a term contract on temporary basis and having started as a Junior clerk which position was unionisable. CW2 proved that she was indeed employed by the Respondent as per her N.S.S.F. Statement (C-Exh-11) which indicated that the Respondent was her employer for the period 1/11/2011 to 31/08/2016. The last payment for NSSF had been paid for August 2016 when CW2 last worked for the Respondent. The Respondent did not controvert this evidence to deny that it had not paid the said statutory deduction on behalf of CW2. The burden of proof had shifted to the employer to produce records to rebut the NSSF statement.
56. It therefore follows that having not issued CW2 with any evidence of having absconded work and having failed to issue her with the reasons for the verbal suspension and subsequent dismissal, the Respondent unlawfully terminated the services of CW2.



CW3- Moses

57. DW1 during cross-examination stated that before the list of short-listed farmers reached at the generating section where CW3 was in-charge of printing clerks, the shortlisting had already been approved and names of the clerks who generated the permits under CW3 were indicated and no record was available showing that CW3 had delayed in the generation of permits nor was their evidence that CW3 had denied permits to farmers. There was no proof that farmers had been exploited by brokers or connection with CW3.
58. Like CW3, during disciplinary proceedings of 17th February 2017, whose minutes were produced as (R-Exh-2C), the Respondent sought clarification from CW3 on the relationship he had with various persons and the nature of his Mpesa transactions with him, being Godfrey Mukanzi, Everline Masayi and Emmanuel Akal. CW3 responded that he had purchased farm equipment for Mr. Ekal who was domiciled out of Kabras and paid his farm workers on his behalf and as for Mr. Mukanzi they had a lease partnership and grew cane together and shared the proceeds and Mr. Mukanzi had borrowed and refunded money to him in installments. As to Everline, CW3 replied that she had borrowed him money and she was paying the same through Mpesa.
59. CW3 during the hearing had clarified that he owed a shop, posho mill, 50 acres of cane, a motorbike for boda boda, a Family Mpesa Shop and run a money lending venture that brought him income and his suspension was wrong.
60. The respondent like with CW1 produced print -out of what they termed ledger analysis and Mpesa statement for CW3. From the foregoing, it was clear that the Respondents did not have any concrete evidence that linked CW3 to any accusations of bribery but only relied on the fact that he had many Mpesa transactions with two field assistants (Godfrey Mukanzi(Kshs. 202,800) and Everlyne Masayi (147,965) and a farmer(Emmanuel Ekal(Kshs. 15, 792) that were of large amounts.
61. The Respondent produced the said Ledger Analysis and M-pesa statements allegedly belonging to CW3 that had no details from where they had been obtained. The law governing production of print outs is governed by section 65(8) of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides:-

“In any proceedings under this Act where it is desired to give a computer print- out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

- (a) Identifying a document containing a print-out or statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by the computer
- (c) dealing with any of the matters to which conditions mentioned in subsection (6) relate.

Which is certified by a person holding a responsibility position in relation to the operation of the relevant device or the management of the activities which the document relates in the ordinary course of business shall be admissible in evidence....”



62. The print -out information provided by the Respondent bore no record of where the information had been obtained and how the same had been obtained. No certificate was produced as required under Section 65(8) of the *Evidence Act*, and with the Mpesa transaction having been the only nexus of CW3 to the bribery allegations, the evidence thereof should have complied with the law on admissibility. The court in *Alex Ngoko v Republic* [(supra) held:-

“We have reviewed the proceedings and it is clear that neither the prosecution nor the learned magistrate paid attention to the admissibility of the statements and the need to comply with the provisions of section 65(8) of the *Evidence Act*. The certificate required by the Act was not produced.

In *Charles Matu Mburu v Republic* NYR CA Crim App. No. 34 of 2014 [2014]eKLR, the Court of Appeal, in similar circumstances, observed that;

In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased’s mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant’s submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.

In our assessment the case against the appellant could not be proved without production of the computer generated statements of account from Safaricom connecting the complainant’s Mpesa agency account, the account in the name of Thomas Gichana and the accounts of PW 3 and PW 4. In the absence of such statements, no connection could be made between the robbery of 24th January 2013 and the appellant.”

63. Though CW3 did not raise any issue relating to the truthfulness of the Mpesa transactions produced by the respondent, there was no record of when the Mpesa information was obtained. The Respondent in its disciplinary meeting held on 17th February 2017 alluded to the transactions between CW3 with the field assistants and a farmer as suspicion and that inferred them to suspect CW3 with involvement in corruption. The respondent investigations of bribery did not stipulate what period the alleged bribery incidences had been going on. There was no record from farmers of when the bribery had been undertaken.

64. There was no record that CW3 had in any way received any bribery in relation to his job and he had reasonably explained the transaction with his colleagues and friends which reasons were reasonable to the Respondent.

65. The Respondent picked on CW3 due to his alleged Mpesa transactions volume. The respondent had referred the matter to the police and CW3 recorded statement. The outcome of the investigation is unknown. The respondent thwarted effort by the claimant to produce police investigation report by having it expunged. The court drew inference that the report was favourable to the employees. In any event since the complaints by farmers were allegedly anonymous, the farmers could have mentioned the brokers and staff involved in the bribery allegations, the farmers not necessarily identifying their identity if they feared victimisation. This was not the case.

66. In the upshot I find on balance of probabilities that the reason for the summary dismissal of the CW3 was not valid in the circumstances.



Procedural fairness

67. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness for gross misconduct is as defined under section 41(2) of the *Employment Act* to wit:-

‘41

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

68. The claimant faults the suspension of CW1 and CW3 in that they were suspended on 1st September 2016(C-Exh- 5(a) & 5(b) respectively and their suspension letters not copied to the Claimant. The Claimant protested the same through its letter of 23rd September 2016(C-Exh-7b). Additionally, the Respondent proceeded to unilaterally extend their suspension(C-Exh-6(a) & 6(b) contrary to the CBA provisions where extension of suspension period could not be unilaterally decided by the Respondent, nor were the extension letters copied to the claimant. The Claimant wrote to the Respondent on 4th October 2016 (C-Exh-7a) protesting the suspension of CW1, C2 and CW3 and the Respondent ignored the same. CW1 & CW3 attended the disciplinary hearing and they explained their Mpesa Transactions history satisfactorily and thus the Respondent’s decision was made without any evidence.

69. The Claimant submitted that suspension is not provided for in the *Employment Act* and can only be guided strictly by the terms of employment and in this case it was CBA Clause 8 . To buttress this point, the claimant relied on the decision of Hon. Maureen Anyango in *Roselyne Atieno Ogolla v Kibos Sugar Industries & Allied Industries Limited* [2017] eKLR where the court held: “Suspension is not provided for in the *Employment Act* and can therefore only be resorted to if provided for in the Claimant’s terms of employment which were not referred to or submitted to the court. Secondly suspension cannot be verbal unless again specifically provided for in terms and conditions of employment. Thirdly, the letter of suspension states the suspension was indefinite. An indefinite suspension is unfair unless there is valid reason that has been communicated to the employee explaining the same. An employee must not be subjected to uncertainties with regard to their employment status or discipline as this would subject the employee to undue suffering...”

70. The Claimant submitted that the Respondent reinstated CW1 and CW3 pursuant to the Section 8 (iii) f of the CBA having found no evidence against them and then proceeded to conduct disciplinary hearing which was a reintroduction of allegations contrary to the CBA even when a police report had not been issued.

71. CW1 & CW3 argued that they never received any notice of attending their appeal hearing and the Respondent did not show proof that the said letters were served upon them, as the Suspension and Extension letters were issued at the Respondent’s premises.

CW2

72. The Claimant submitted that CW2 was verbally dismissed without any reason. The Claimant argued that the reason of abscondment alleged by the respondent was an afterthought as there was no letter stating that CW1 had absconded her duty and in any event whether she was a temporary worker she was entitled to the protection of her rights under Section 43, 44 & 45 of the *Employment Act*. DW1 during



cross-examination stated that CW2 had absconded duty after her weighbridge section was flagged as one of the corruption areas in the company.

Response

73. The Respondent submits that it complied with the legal process under section 41 of the Employment Act as CW1 & CW3 were first issued with complaints letters on 25th August 2016 and given two weeks to respond to which they responded to on 31st August 2016 and on 1st September 2016 respectively, having understood the allegations. That CW1& CW3 were suspended on 1st September 2016 and their suspension extended on 30th September 2016. The respondent objects to the Claimants objection to the legality of the suspension and has asked the court in its finding to find that the suspension and extension thereto are legal and that the employer has a right to suspend an employee for investigations and the court to be guided by the decisions in Galgalo Jarso Jillo v Agricultural Finance corporation (2021)eKLR, Chrispus Illeli Kunuwa v County Government of Kitui & Another (2020) eKLR and Hinga Mbugua v Keroche Industries (2016).
74. The respondent submits that CW1 & CW3 were invited on 14th February 2012 to attend the disciplinary proceedings on 17th February 2017 and they attended accompanied by their witnesses and were asked to give their submissions before the committee before their dismissal. That CW1 and CW3 both appealed on 6th May 2017 and 28th February 2017 and they were invited for the appeal hearing through the letters dated 30th June 2017 for hearing on 1st July 2017 to which hearing they did not appear.
75. The Respondent submits that CW1 & CW3 were accorded fair disciplinary hearing and they were dismissed based on the evaluation of the evidence available.

Decision on procedural fairness

76. The court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR observed on procedural fairness :-
- ‘13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed ...’(emphasis mine)
77. Section 41 of the Employment Act provides for the procedure for fair termination as follows:-
- ‘41.
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.’



CW1& CW3

78. It was not disputed there were disciplinary proceedings before the termination of employment of CW1 and CW3 on 17th February 2017. There was also the complaints letters of 25th August 2016 which sufficed as Show cause letters.

79. While the *Employment Act* requires the employer to prove the reasons for termination or dismissal (section 43); prove the reasons are valid and fair The respondent's complaint's letter read in part:-

“Consequently, you are required to explain in detail how harvesting permits have been going to brokers instead of to farmers as per the company procedure within 2 weeks from the date of this letter. You are also required within the same period to forward names of brokers , and all persons who have been engaging in exploiting of farmers and reasons as to why they have been exploiting farmers in confidence to the managing director , general manager, financial manager, financial controller or the group business Development Manager in writing or through cell phone numbers listed herein below:-

.....

You are unequivocally informed that should you not come forward with the above information and on-going investigations reveal that the corrupt practices and misconduct mentioned herein above continues unabated in your area of jurisdiction , your loyalty , commitment and service to the company will be called into question and you will be held personally responsible and accountable for any consequences arising there from.”(emphasis Given)

80. From the onset, the Respondent had already given CW1 & CW3 the consequence of failing to produce a list of brokers and persons allegedly exploiting farmers. CW1 & CW3 were doomed from the onset if they did or did not provide a list of brokers or the persons exploiting farmers. The Respondent was on a fishing expedition from CW1 & CW3 and required them to provide a list that was to confirm that they indeed they were involved with brokers and knew the said brokers.

81. The court finds that from the compliant letter the Respondent did not have proof of the existence of the brokers it alleged in the complaint letters that CW1 & CW3 had issued permits. The respondent without having undertaken investigations at the point of issuing the Complaints letters on 25th August 2016, already had a negative attitude toward CW1 & CW3 and indeed stated:- “You are unequivocally informed that should you not come forward with the above information....” This was condemning CW1 & CW3 before even conducting investigations and as I have held above, there was no proof of existence of brokers or permits that were issued to brokers. The Respondent failed to that extend to prove the grounds of the existence of the reasons CW1 & CW3 had been sent on suspension or the reasons of the complaint letters.

Suspension

82. The Respondent had issued suspension letters to CW1 and CW3 and rightly so, as the Respondent argues, an employer can send its employees on administrative suspension pending investigations, the process of suspension must adhere to set down guidelines.

83. The Claimant and the Respondent were bound by the terms of Recognition Agreement of 1997(C-Exh-1) and the C.B.A in force at the time of the dispute covering the period of 1st May 2015 to 30th April 2017 (C-Exh-2) . The Disciplinary Procedure was provided under C.B.A No. 8 (iii) where the



suspension of any misconduct that required investigations was to be for a period of twenty-one days with half pay.

84. The letter of suspension was to be copied to the claimant's Branch secretary. Upon lapse of the 21 day's suspension the employee was to be reinstated unless more time was required for further investigations, but such extension was to be discussed with the Claimant to agree with the Respondent and the Employee would continue to receive half pay. If the investigations confirmed that the employee was guilty of the offence suspended on, they could be dismissed and if the offence did not warrant dismissal, the employee would be issued with a warning letter copied to the branch secretary of the claimant and if the investigations did not find the employee having committed any offence, the employee was to be reinstated with full pay and benefits with effect from the suspension.
85. The respondent in breach of the procedure for suspension under the C.B.A. sent CW1 and CW3 on suspension and failed to notify the Claimant who protested the respondent's conduct but no action was taken by the Respondent. Additionally, upon the lapse of the 21 days suspension period required under the C.B.A, the Respondent proceeded to extend the suspension period for a further 21 days with no notice to the Claimant as mandated in the CBA(Clause 8(iii)(c).
86. The court finds that the respondent had already gone against the disciplinary procedure agreed upon at the suspension point which was against CW1's & CW3's right to fair procedure.
87. The court finds that the action by the respondent of reinstating CW1 and CW3 on 11th November 2016 and then commencing disciplinary measures was against the C.B.A which stated that "if investigations do not confirm that the employee committed the offence for which he or she was suspended the employee shall be reinstated with full pay and benefits with effect from the date of suspension." Conversely, the respondent reinstated CW1 and CW3 and continued with the disciplinary measures from recording police statements to the disciplinary hearing that in itself did not inquire from CW1 and CW3 issues relating to brokers having being given permits but instead concentrated on the Mpesa transactions of the two Grievants without linkage to the exploitation of farmers or the brokers. . The Respondent had already gone against the terms of the C.B.A in breach of the Grievants rights.
88. It is not disputed that CW1 & CW3 were served with the invitation to attend the Disciplinary committee meeting through the letters dated 14th February 2017(R-Exh- 1C and R-Exh-2C respectively. That they attended the Disciplinary hearing and were accompanied by two of the Claimant's shop representatives Mr. Yusto Luchivya and Mr. Gordon Ogada.
89. The Committee reached a decision that terminated CW1's & CW3's employment on 23rd February 2017 based on accusations by farmers, members of public and fellow employees that they were involved in issuing harvesting permits to unregistered or uncontracted persons against the company rules and soliciting for bribes before issuing permits. From the record of the disciplinary hearing minutes, the accusations by the farmers, members of the public or fellow employees had not been tabled at the hearing or issued to CW1 and CW3. There was no proof that there were permits that had been issued to uncontracted persons or unregistered persons, which could have been easy on the part of the respondent to find since the records of the permits were available.
90. During hearing, CW3, testified that the permit generation was in duplicate, a copy was issued to the farmer and the other one was retained by the Respondent. The Respondent could have done an investigation in its records and could have found if at all any permits that had been issued to persons who were not registered or those not approved through the shortlisting form. This was not done. No evidence had been produced that the Mpesa transactions of CW1 & CW3 were indeed a bribe.



91. As to the grounds for summary dismissal which under the C.B.A. were guided by the [Employment Act](#), the employer failed to prove the reasons for dismissal of CW1 & CW3; the reasons for the dismissal were imaginary and were not justified to warrant dismissal of CW1 & CW3. Justice Nzioka in [Freddy Kipkorir Lang'at v Co-operative University of Kenya](#) [2021] eKLR stated that:--

“9. The decision of *Walter Ogal Anuro v Teachers Service Commission* (supra) held in paragraph 23 thereof as follows:-

23. It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of due procedure.

In this case, the Respondent similarly did not go the whole way by disallowing the Claimant an opportunity to defend himself. The tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken in the disciplinary process but also documentation to prepare a defence where such documentation is in the custody of the Respondent as in this case. Put another way, if one is accused of misleading the employer and the evidence for such is the correspondence with a third party, it is incumbent upon the employer to lay the whole case against the employee by availing the full accusation and await the response or defence of the employee. In the final analysis the termination herein is found to have been ipso facto unfair for want of procedure.....” I do uphold the foregoing decision to find that CW1 and CW3 were not provided with investigation reports and details of the bribery like name of a farmer to enable them mount their defence against the accusation of bribery. Consequently I hold the disciplinary hearing for CW1 and CW3 did not meet procedural fairness.

CW2

92. As regards CW2, the suspension was verbal for 7 days initially and after the seven days she was not allowed to enter the Respondent's premises. No reason for suspension was given and even when the Claimant wrote to the respondent on 4th October 2016, no response was given as to the suspension.

93. DW1 during hearing confirmed that CW2 was a weighbridge clerk working for the Respondent and stated that she had absconded work. Section 2 of the [Employment Act](#), defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. Section 45 of the [Employment Act](#) provides that:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—



- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - SUBPARA (ii)
based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—
- (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”

94. CW2 had worked for the Respondent, a position confirmed by DW1 and as an employee she was entitled to due process before termination. DW1 alleged that CW2 had absconded work, this reason was never communicated to CW2 to seek reasons why she had absconded work. The Respondent did not follow up. It was indeed true that CW2 had been suspended as DW1 confirmed that she has absconded work since the investigations targeted her department and when asked whether he knew other people who had absconded work, DW1 only knew of CW2 and no other persons, despite alleging that many people had resigned or absconded work to avoid being investigated. Relying on the decision of Justice Nzioka in *Freddy Kipkorir Lang'at v Co-operative University of Kenya* (Supra), the respondent, failed on all tenets of fair procedure having failed to notify, or hear CW2 before her termination.

Issue C. Whether the claimant is entitled to reliefs sought.

95. The Claimant seeks various prayers for each grievant. The common prayers are; A declaration be made to the effect that, the summary dismissal of the above employees was wrongful, unlawful, unprocedural and unfair; that All the above aggrieved employees are reinstated back on duty without loss of benefits from the date of dismissal and that all Grievants be issued with certificate of service.

96. The claimant relied on various authorities namely: *Omondi Justus Ranga'nga & 28 others vs KCB Bank Kenya Ltd* Cause no. E618 of 2021; and *Kenya Chemical and Allied Workers Union vs East African Portland Cement Co. Ltd*, Cause no 2119 of 2014. The respondent in objecting the grant of the reliefs sought by the claimant relied on various authorities namely: *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR; *Kenya Union of Commercial Food and Allied Workers Union V KAPA Oil Refineries Limited* (2018) eKLR; *Consolata Kemunto Aming'a v Milimani High School*(2009)eKLR; *Benard Mochama Onduma & Another v Amos Kimwomu Nyaribo*(2012)eKLR; *Stephen O. Edewa v Lavington Security Limited* (2019)eKLR.



97. The court has found that the Claimant has proved that the respondent unlawfully dismissed the Grievants (CW1, CW2& CW3).

Prayer for Reinstatement

98. As to the issue of reinstatement, the court is guided by The Court of Appeal decision in *Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union* [2017] eKLR where G.B.M. Kariuki, Sichale & Kantai, JJA stated that:-

“The ordinary meaning of the language of Section 12 of the *Employment and Labour Relations Court Act* is that the labour Court is empowered to order reinstatement of a dismissed employee within three years of dismissal. Parliament in its wisdom capped that period at three years and there is no provision or proviso qualifying that provision to say that time stops running or is interrupted by an action filed in court.”

99. The Claimant filed this suit on 3rd July 2018, and at the date of this judgement five years have so far passed. It would be impracticable for the employer to reinstate the Grievants. Section 12 (3) (vii) of the *Employment and Labour Relations Court Act* bars the court from granting that relief where three years have lapsed from the date of dismissal.

“3. In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;” The prayer for reinstatement is declined.

Prayer for Certificate of Service

100. All Grievant CW1, CW2, & CW3 are entitled to their Certificate of Service under Section 51 of the *Employment Act*.

Other prayers :-

101. I proceed to consider the rest of the relies sought .
102. CW1 prayed for various orders and having found that her dismissal was unlawful, I shall issue the prayers as below:-

g. Claim for Maximum compensation of 12 month gross salary for unlawful loss of employment 12 months x Kshs. 33,773.35= Kshs. 405, 280.20

Decision:

103. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. (See *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR) where the court held: “ In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others.”



104. CW1 in her testimony, told this court that she has never secured employment as she was portrayed as a bad person in the society. CW1 has not shown proof of any attempt of seeking employment and was turned down based on the reason of her reputation. CW1 produced her pay slip where she received a gross pay of Kshs. 33,773.35. CW1 was already awarded notice pay of two months. The court considered that she did inform the court she was engaged in other transactions which led to her receiving monies from various persons during period of employment. The court in the circumstances considered award of Kshs. 4 months salary sufficient compensation.

She is awarded four month's salary being Kshs. 33,773.35 *4 months = Kshs. 135,093.40/-

h. Claim for Payment of Annual leave for the year 2014 as per C.B.A clause 16 30 days(28,031 x 12)/2496 X8 hrs = 32,343.45

Decision

105. During hearing, CW1 confirmed that she did not have leave days for the year 2014, but had leave days for the year 2015. She did not opt to amend her claim. CW1 failed to prove her claim for leave days for the year 2014.

This claim fails.

i. Claim for Accrued payments of half pay while on unlawful suspension. (C.B.A clause 8 iif). September 2016 (28,031- 10,242.15) Kshs. 17, 788.85 October 2016 (28,031- 16,171.80) Kshs. 11, 859.20 Total=Kshs. 29,648.05

Decision

106. Having found that the dismissal was unfair, CW1 was entitled to her full salary during suspension and extended suspension having received half pay. She will be entitled to the balance of Kshs. 17, 788.85 for September 2016 and 11, 859.20 for October 2016 totaling to Kshs. 29,648.05.

j. Claim for Payment in lieu of notice of termination having served for 11 years as per clause 9 c of the C.B.A i.e. 3 month x 28,031 = Kshs. 84,093

107. During hearing CW1 confirmed she was employed in 2009 and the Respondent produced her employment contract for 2009. CW1 could not prove she was employed in 2006. As per the CBA clause 9c only persons who had served for continuous ten years were entitled to 3 month's in lieu of notice. But under Clause 9b having worked for five years she was entitled to two months' salary in lieu of notice. Consequently, CW1 having worked for 7 years 10 months, she was legible to 2 month's salary in lieu of notice. Therefore, In light of the termination being unlawful and unfair the court awards to CW1 two month's salary in lieu of notice at Kshs. 28,031/= * 2= Kshs. 56,062/-.

k. Claim for 15days service pay for each year worked for 11 years 15 days (28,031 x 12x8)/2496 x11 years=Kshs. 177,889.00

108. During the hearing CW1 produced her Pay slips (C-Exh-3a) that showed her statutory deductions including NSSF were paid. Service pay is only payable if the statutory deductions are not remitted. This claim fails.



l. Claim for Compensation for psychological damages and injured feelings . Kshs. 3,000,000.0 Total of Kshs. 3,729,253.70

Decision.

109. CW1 did not provide evidence of psychological injury he has suffered for an award of damages. The court is persuaded that the award of 4 months for wrongful dismissal above suffices.

CW3- Mr. Moses Anaswa

110. CW3 prayed for various orders and having found that his dismissal was unlawful, I shall issue the prayers as below:-

g. Claim for Maximum compensation of 12 month gross salary for unlawful loss of employment 12 months x Kshs. 32,236.00= Kshs. 386,832.00

Decision: -

111. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. (See *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR)

“In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others.”

112. CW3 in his testimony, told this court that he has never secured employment as he was portrayed as a bad person in the society. CW3 has not shown proof of any attempt of seeking employment and was turned down based on the reason of his reputation. The court noted that CW3 admitted to have had other sources of income while employed. He was awarded notice pay. CW3 produced his pay slip where he received a gross pay of Kshs. 32,236.00

The court awards as sufficient compensation the equivalent of 4 month’s salary being Kshs. 32236 *4months = Kshs. 128,944/-.

h. Claim for Payment of Annual leave for the year 2014 as per C.B.A clause 16 42 days(28,031 x 12)/2496 X8 hrs = 45,280.85

Decision

113. During hearing, CW3 produced two leave forms one that indicated he had leave days for the year 2014 and 2015 cumulatively of 30days. The other form indicated he had 18 days of leave for the year 2015. As per the claim, the claim for 2014 was for the remainder of 30 days and 18 days which is 12 days of leave for the year 2014. The claimant is awarded twelve days leave for the year 2014.

=12days(28,031 x 12)/ 2496 X8 hrs = 32,343.45

= 12, 937.38 is awarded.



**i. Claim for Accrued payments of half pay while on unlawful suspension. (C.B.A clause 8 iif).
September 2016 (28,031- 10,242.15) Kshs. 17, 788.85 October 2016 (28,031- 16,171.80)
Kshs. 11, 859.20 Total=Kshs. 29,648.05**

Decision

114. Having found that the dismissal was unfair, CW3 was entitled to his full salary during suspension and extended suspension having received half pay. He will be entitled to the balance of Kshs. 17, 788.85 for September 2016 and 11, 859.20 for October 2016 totaling to Kshs. 29,648.05 which is awarded.

j. Claim for Payment in lieu of notice of termination having served for 24 years as per clause 9 c of the C.B.A i.e. 3 month x 28,031 = Kshs. 84,093

Decision

115. DW1 produced the employment contract for CW3 which was governed by the C.B.A. CW3 had worked from 30th July 2001 to 23rd February 2017 which was 15 years 6 months in the employ of the respondent. Under the C.B.A. clause 9c, having worked for more than ten years, CW3 was entitled to 3 month's salary in lieu of notice. Therefore, CW3 is awarded three month's salary in lieu of notice as claimed thus 3 months x Kshs. 28,031 = Kshs. 84,093

k. Claim for 15days service pay for each year worked for 24 years 2496

116. During the hearing CW3 produced his Pay slips (C-Exh-3b) that showed his statutory deductions including NSSF were paid. Service pay is only payable if the statutory deductions are not remitted. This claim fails.

l. Claim for Compensation for psychological damages and injured feelings . Kshs. 3,000,000.0 Total of Kshs. 3,849,882.40

Decision.

117. CW3 did not provide evidence of psychological injury he has suffered for an award of damages. The court is persuaded that the award of 4 months for wrongful dismissal above suffices.

CW2

118. DW1 confirmed that CW2 was engaged as at the time of her dismissal as a Junior Clerk in the weighbridge section on "term contract on temporary basis". CW2 provided term contracts from the period of September 2009 when she was employed as a Junior Clerk. There was no proof adduced that she had been engaged in 2008.

119. The Respondent argued that the claimant was a piece rate work employee and her contract expired on a daily basis and having joined the Union in on 30th January 2016, she was not entitled to claims of underpayment under CBA terms. But asked further relating the three month's contracts issued to CW2 in 2010, DW1 confirmed she was on term contracts.

120. Section 37 of the [Employment Act](#), provides for conversion of terms of employment as follows:- :-

"37. (Conversion of casual employment to term contract)

(1) Notwithstanding any provisions of this Act, where a casual employee—



- (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
- (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.”

Under section 37(3) thus an employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.’

- 121. Having worked for more than one month and having being performing work that was continuous and could not be completed within three months, then CW2’s employment was converted from a casual employee to a term contract.
- 122. CW2 produced evidence that she was engaged as a junior Clerk in 2009 by the Respondent, but she did not produce any evidence to the contrary that her employment status had changed during the said period to that of a Weigh bridge clerk. In the absence of such evidence her employment status remained that of a junior clerk. CW2 submitted that she was paid a basic salary of Kshs. 13,624.00, the court will rely on the said amount as what she was paid during her term, the Respondent had details of how much was paid to CW2 over time but did not produce it.
- 123. CW2 argued that she was discriminated upon as she was placed on inferior terms and conditions as compared to other employees in the same position who enjoyed CBA terms . CW2 submitted that from the initiation of her employment she was discriminately treated by the Employer and relied on the decision in *Omondi Justus Rang’anga & 28 Others -vs- KCB Bank Kenya Limited Cause No. 618 of 2021*.
- 124. This court in *West Kenya Sugar Company Limited v Libungu* (Employment and Labour Relations Appeal E001 of 2023) [2023] KEELRC 1354 (KLR) (30 May 2023) held:

“The principle of “ equal work should receive equal pay” was discussed in decision cited by Appellant of *Erastus K. Gitonga-vs- National Environmental Management Authority, Law Society of Kenya 9 interested party*) 2019 eKLR where Justice Byram Ongaya cited with approval decision in *Louw-v- Golden Arrow Bus Services (PTY) Limited (1999) ZALC 166* to wit:-

‘ “The principle “equal work should receive equal pay” in its true form may be extended to analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed, e.g. the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination. In other words it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for



so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin.”

In the *Ol Pejeta Ranching Limited -vs David Wanjau Muhoro* (2017) Eklr a decision of the court of Appeal relied on by both parties. On similar work pay the court held:-

“ further , fairness requires that people doing similar work should receive equal pay”. Similar work is not the same as work of equal value as a claimant in the case of equal work the claimant has to prove the equal value. At page 178, the court found that the Appellant paid mobility allowance at same rate as unionized field assistants. The court holds that the difference in the basic salary for the similar job was arbitrary. The court holds that the case before the lower court being of similar work (field assistant) with unequal pay, the learned trial magistrate rightly held it was discrimination to pay different wages for similar job by the appellant against the respondent .”

125. The court relies on its finding in *West Kenya Sugar Company Limited v Lihungu* (supra) to find that the difference in the basic salary for the similar job of a junior clerk was arbitrary and discriminatory.

Therefore the court shall award CW2 as follows:-

a. Claim Maximum compensation of 12 month gross salary for unlawful loss of employment 12 months x Kshs. 24,053.40= Kshs. 288,640.80

Decision

126. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. (See *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR) where the court held: “ In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others.”

127. CW2 did not tell the court whether or not she has secured another job, nor she give evidence that she is not able to obtain alternative employment. CW2 told the court she was paid a monthly salary of Kshs. 13,624.00. The said amount was an underpayment as will be shown below. She was entitled to a monthly salary of Kshs. 19, 474 at the time of termination. CW2 was paid notice pay.

The court awards as compensation for the unfair termination the equivalent of six month’s salary being Kshs. 19,474 *6 months = Kshs. 116,844/-.

b. Claim for Payment of accrued Annual leave from date of employment 2008 to 2016) for 8 years as per C.B.A Clause 16 28 days(per year for 8 years = 224 Daily rate(20, 916 x 12)/2496 X8 hrs = 804.50 224 days x 804.50= Kshs. 180,208.00

128. Annual leave is provided for under Section 28 of the *Employment Act* as follows –

“ 28. Annual leave

(1) An employee shall be entitled—



- (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
 - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
- (2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under subsection (1)(a) into different parts to be taken at different intervals.
 - (3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave-earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
 - (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.
 - (5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.

129. The foregoing are very elaborate provisions of the law. In addition, the CBAs between the Claimant and the Respondent which regulate employment of all unionisable workers without discrimination provide for annual leave as follows:–

“An employee who completes twelve (12) months continuous service shall be granted leave of absence with full pay for twenty-eight (28) working days at the discretion of the company and exigencies of duty.”

130. CW2 began work in September 2009 to August 2016, which amounts to 6 years and Eleven Months. The full continuous period of twelve months was six years, and CW2 was entitled to leave. The court



awards leave limited 3 years prior to termination. Considering that CW2 was entitled to different salary depending on the salary increments in different period, the higher rate within each period shall apply. The leave days were 28 days per year for 3 years = 84days leave days

Year (4)

September 2012 to August 2013= (Basic pay)Kshs.15,041.00

Daily rate(15041 x 12) X8 hrs = 578.50

2496

578.50*28=16,198

Year (5)

September 2013 to August 2014= (Basic Pay)=Kshs.16,545.00

Daily rate(16,545.00 x 12)/2496 X8 hrs = 636.35

636.35*28=17,817.80

Year (6)

September 2014 to August 2015= Kshs.18,200.00

Daily rate(18,200 x 12)/2496 X8 hrs = 700

700*28=19,600

Annual Leave award = 16,198+17,817.80+19,600 total 53,615.80

c. Claim for Accrued payments for Public Holidays for the 8 years worked. Daily rate (20916x 12)/2496 x8hrs = Kshs. 804.50 Ten public holidays per year 10 x 804.50= 8,045.00 Total pay for 8 years 8 x 8,045.00 = Kshs. 64, 360.00

131. The court in *Reef Hotel Limited v Josephine Chivatsi* [2021] eKLR held:-

“ 30. An employee claiming compensation for working on public holidays is required to adduce evidence as to which particular holidays they worked. This position was affirmed by the Court of Appeal in its decision in *Rogoli Ole Manadiegi v General Cargo Services Limited* [2016] eKLR in the following words: “It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime showing specifically how it was arrived at....”

132. CW2 did not adduce evidence of which public holidays she had worked; the reference to ten holidays does not indicate which holidays specifically and therefore this claim fails.

d. Claim for House allowance for 8 years worked The C.B.A Clause 22 provides for house allowance at the rate of 15% of the Basic Salary Thus basic salary of 20,916 x 15% = 3,137.40 per month



**12 months x 3,137.40 = Kshs. 37,648.80 per year House allowance for the period of service(8)
years 8 years x Kshs. 37,648.80 = Kshs. 301,190.40.**

133. The Respondent argued that CW2's salary was an all-inclusive pay which consolidated the house allowance and relied on the decision in *Stephen O. Edewa V Lavington Security Limited*(2019) eKLR. However, as the per the C.B.As adduced, employees were entitled to 15% of their monthly basic salary.



CB.A -2009 to 2011		
As Junior Clerk (ug 01)	September 2009 To April 2010 (8 Months)	May 2010 To April 2011
As Per C.b.a	Kshs. 9, 232*8= Kshs. 73,856	Kshs. 10709*11= Kshs. 117,799
What Was Paid	Kshs. 13,624*8= Kshs. 108,992	Kshs. 13,624*11= Kshs. 149,864
Salary Overpayment	108,992- 73, 856= Kshs. 35,136	149,864- 117,799= Kshs. 32,065
Housing Allowance (15%)	Kshs. 73,856*15% = 11,078.40	Kshs. 117, 799*15%= 17,669.85
House Allowance Payable	None	None
CBA 2011 TO 2013		
As Junior Clerk (ug 01)	May 2011 To april 2012	May 2012 To April 2013
As Per Cba	Kshs. 12,101*11= Kshs. 133,111	Kshs. 13,674*11= Kshs. 150,414
What Was Paid	Kshs. 13,624*11= Kshs. 149,864	Kshs. 13,624*11= Kshs. 149,864
Underpayment	Kshs. 550	
Housing Allowance (15%)	Kshs. 133,111*15%=kshs. 19,966.65	Kshs. 150,414*15%= Kshs. 22,562.10
C.B.A.2013 To 2015		
As Junior Clerk (ug 01)	May 2013 To April 2014	May 2014 To April 2015
As Per C.B.A	Kshs. 15,041*11= Kshs. 165,451	Kshs. 16,545*11= Kshs. 181,995
What Was Paid	Kshs. 13,624*11= Kshs. 149,864	Kshs. 13,624*11= Kshs. 149,864
Underpayment	Kshs. 15,587	Kshs. 32,131
Housing Allowance(15%)	Kshs. 165,451*15%=kshs. 24,817.65	Kshs. 181,995*15%=kshs. 27,299.25



C.B.A 2015 To 2017		
As Junior Clerk (ug 01)	May 2015 To April 2016	May 2016 To September 2016
As Per C.B.A	Kshs. 18,200*11= Kshs. 200,200	Kshs. 19,474*5= Kshs. 97,370
What Was Paid	Kshs. 13,624*11= Kshs. 149,864	Kshs. 13,624*5= Kshs. 68,120
Underpayment	Kshs. 50,336	Kshs. 29,250
Housing Allowance(15%)	Kshs. 200,200*15%= Kshs. 30,030/-	Kshs. 97,370*15%=Kshs. 14,605.50

= Kshs. 19,966.65+ Kshs. 22,562.10+ Kshs. 24,817.65+ Kshs. 27,299.25+ Kshs. 30,030+ Kshs. 14,605.50= Kshs. 89,284.50 awarded as unpaid housing allowance.

e. claim for Payment in lieu of notice of termination having served for 8 years as per clause 9 b of the C.B.A i.e. 2 month x 20,916.00 = Kshs. 41,832.00

134. CW2 produced contracts for the commencement of her employment from September 2009. Until the termination period of 1st September 2016, she had worked for six years and eleven Months for the Respondent. She was a member of the Claimant union as shown by her membership form. CW2 was entitled to not less that terms of the CBA as a unionisable worker. Clause 9b of the C.B.A. having worked for more than five years, in her case 6 years 11months, she was entitled to two months' salary in lieu of notice.

Kshs. 19,474*2= Kshs. 38,948 awarded as notice pay

f. Claim for 15days service pay for each year worked (she worked for 8 years) as she was not entitled to provident fund. Daily rate (20,916 x 12)/ 2496 x 8hrs =Kshs. 804.50 Per Year worked. Kshs. 804.50 x 15 days = Kshs. 12,067.50 For 8 years 12,067.50 x 8 years = Kshs. 96,540.00

135. During the hearing CW2 produced her NSSF Statement (C-Exh-11) and asserted that the employer had remitted the said payments on her accord. Service pay is only payable if the statutory deductions are not remitted. This claim fails.

g. Claim for Payment of arrears arising from salary underpayment for the 8 years. Monthly Salary Under Payment Of Kshs. 20,916-13,624= Kshs. 7,292.00 8 years x 12 months x 7,292= Kshs. 700,032.00

136. CW2 was entitled to salary as a junior clerk as outlined in the table below in order to determine when she was underpaid.



CB.A -2009 TO 2011		
As Junior Clerk (ug 01)	September 2009 To April 2010 (8 Months)	May 2010 To April 2011
As Per C.B.A	Kshs. 9232*8= Kshs. 73,856	Kshs. 10709*11= Kshs. 117,799
What Was Paid	Kshs. 13,624*8= Kshs. 108,992	Kshs. 13,624*11= Kshs. 149,864
Underpayment	-	-
CBA 2011 TO 2013		
As Junior Clerk (ug 01)	May 2011 To april 2012	May 2012 To April 2013
As Per CBA	Kshs. 12,101*11= Kshs. 133,111	Kshs. 13,674*11= Kshs. 150,414
What Was Paid	Kshs. 13,624*11= Kshs. 149,864	Kshs. 13,624*11= Kshs. 149,864
Underpayment	Kshs. 550	
C.B.A.2013 TO 2015		
As Junior Clerk (ug 01)	May 2013 To April 2014	May 2014 To April 2015
As Per C.B.A	Kshs. 15,041*11= Kshs. 165,451	Kshs. 16,545*11= Kshs. 181,995
What Was Paid	Kshs. 13,624*11= Kshs. 149,864	Kshs. 13,624*11= Kshs. 149,864
Underpayment	Kshs. 15,587	Kshs. 32,131
C.B.A 2015 TO 2017		
As Junior Clerk (ug 01)	May 2015 To April 2016	May 2016 To September 2016
As Per C.B.A	Kshs. 18,200*11= Kshs. 200,200	Kshs. 19,474*5= Kshs. 97,370
What Was Paid	Kshs. 13,624*11= Kshs. 149,864	Kshs. 13,624*5= Kshs. 68,120
Underpayment	Kshs. 50,336	Kshs. 29,250



Total Underpayment : Kshs. 550 + Kshs. 15,587+ Kshs. 32,131 Kshs. 50,336+ Kshs. 29,250= Kshs. 127,854 awarded as underpayment.

h. Claim for Compensation for psychological damages and injured feelings . Kshs. 2,000,000.0 Total of Kshs. 3,672,802.40

Decision

137. CW2 did not provide evidence of psychological injury he has suffered for an award of damages. The court is persuaded that the award of 6 months for wrongful dismissal above suffices.

138. Summary of the Decisions

- a. Termination of the Claimant's(CW1, CW 2& CW3) employment is declared unlawful and unfair.
- b. Claim for reinstatement for all grievants is declined.
- c. Claim for service pay by all Grievants is declined.
- d. Certificate of service to issue to all the grievants through the claimant under section 51 of the [Employment Act](#).

Claim by CW1- Joan Jebichii is awarded as follows:-

- i. Compensation for unfair termination granted at the rate equivalent to Claimant's salary for 4 months, that is to say Kshs. 135,093.40/-
- ii. Claim for Annual Leave for 2014 declined.
- iii. Claim for Accrued Half pay granted at Kshs. 29,648.05
- iv. Claim for Salary in lieu of notice granted at Kshs. 56,062.00
- v. Claim for Service pay declined.
- vi. Claim for compensation for psychological damages and injured feelings declined

Total award : 220,803.45/-

Claim by CW3- Moses Anaswa is awarded as follows:

- i. Compensation for unfair termination granted at the rate equivalent to Claimant's salary for 4 months, that is to say Kshs. 128,944/-
- ii. Claim for Annual Leave for 2014 granted at Kshs. 12,937.38
- iii. Claim for Accrued Half pay granted at Kshs. 29,648.05
- iv. Claim for Salary in lieu of notice granted at Kshs. 84,093
- v. Claim for Service pay declined.
- vi. Claim for compensation for psychological damages and injured feelings declined

Total award :255,627.38/-

Claim by CW2- Cquelien Wanambisi is awarded as follows:

- i. Compensation for unfair termination granted at the rate equivalent to Claimant's salary for 6 months, that is to say Kshs. 116,844.00



- ii. Claim for Annual Leave for three years granted at Kshs. 53,615.80
- iii. Claim for Public holidays declined.
- iv. Claim for House allowance granted at Kshs. 89,284.50
- v. Claim for Salary in lieu of notice granted at Kshs. 38,948.00
- vi. Claim for Service pay declined.
- vii. Claim for underpayment granted at Kshs. 127,854/=
- viii. Claim for compensation for psychological damages and injured feelings declined

Total award : 426,546.30

(All payments for the 3 grievants subject to statutory deductions under section 49(2) of the [Employment Act](#))

- 139. The court assesses and awards the claimant union reasonable transport and filing disbursements in the suit of Kshs. 30,000/-.
- 140. Right of appeal in 30 days.
- 141. Stay of 30 days
- 142. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF SEPTEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence of

For Claimant: Jeremiah Akhonya

For Respondent: Absent

