



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2507 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

EVANS ZIMBASO INDEGE.....1ST CLAIMANT

DANIEL WANYONYI KUNDU.....2ND CLAIMANT

TIMOTHY OGATO.....3RD CLAIMANT

STEPHEN KIVUVA.....4TH CLAIMANT

THOMAS MMPANGA.....5TH CLAIMANT

EMMA NDINDA MAONDO..... 6TH CLAIMANT

JACKLINE NTHOKI MUSAU.....7TH CLAIMANT

ERIC OMBWANYI ANGWENYI.....8TH CLAIMANT

PAUL MUTAI.....9TH CLAIMANT

VERSUS

AFRICA APPARELS (EPZ) LIMITED.....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 10th October 2016, the Claimants sued the Respondent alleging that they were unlawfully and wrongfully dismissed. They pray for –

- (a) Declaration that the Respondent’s decision to dismiss the Claimants was unlawful and unfair and that the Claimants are entitled to payment of their terminal dues and compensatory damages
- (b). An order for the Respondent to pay the Claimants their due terminal benefits and compensatory damages
- (c).. Interest on (b) above until payment is made in full
- (d). Individual claims are as follows: -

(1).. TIMOTHY OGATO

- (i).. Unpaid salary for the month of February... Kshs.13,258
- (ii). 4 months salaries for the remainder of his contract period due to breach Kshs.53,032
- (iii). Compensatory damages for the unlawful dismissal

(12 x 13,258)..... Kshs.159,096

Total..... Kshs.212,128

(2).. EMMA NDINDA

(i).. Unpaid salary for the month of February Kshs.12,771.90

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.51,084.00

(iii). Compensatory damages for the unlawful dismissal

(12 x 12,771.30)..... Kshs.153,252.00

Total.... Kshs.280,971.40

(3).. THOMAS MMPANGA

(i).. Unpaid salary for the month of February... Kshs.12,681

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.50,724

(iii). Compensatory damages for the unlawful dismissal

(12 x 12,681)..... Kshs.152,172

Total..... Kshs.215,577

(4).. STEPHEN KIVUVA

(i).. Unpaid salary for the month of February... Kshs.13,524

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.54,096

(iii). Compensatory damages for the unlawful dismissal

(12 x 13,524)..... Kshs.162,288

Total..... Kshs.229,908

(5).. DANIEL WANYONYI

(i).. Unpaid salary for the month of February... Kshs.13,524

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.54,096

(iii). Compensatory damages for the unlawful dismissal

(12 x 13,524)..... Kshs.162,288

Total..... Kshs.229,908

(6).. EVANS ZIMBASO INDEGE

(i).. Unpaid salary for the month of February... Kshs.12,936

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.51,744

(iii). Compensatory damages for the unlawful dismissal

(12 x 12,936)..... Kshs.155,232

Total..... Kshs.219,912

(7).. JACKLINE NTHOKI MUSAU

(i).. Unpaid salary for the month of February.. Kshs.11,698

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.46,792

(iii). Compensatory damages for the unlawful dismissal

(12 x 11,698)..... Kshs.104,376

Total..... Kshs.162,886

(8).. ERICK OBWANYI ANGWENYI

(i).. Unpaid salary for the month of February... Kshs.13,524

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.54,096

(iii). Compensatory damages for the unlawful dismissal

(12 x 13,524)..... Kshs.162,288

Total..... Kshs.229,908

(9).. PAUL MUTAI

(i).. Unpaid salary for the month of February... Kshs.13,524

(ii). 4 months salaries for the remainder of his contract period due to breach.....
Kshs.54,096

(iii). Compensatory damages for the unlawful dismissal

(12 x 13,524)..... Kshs.162,288

Total..... Kshs.229,908

(e). Costs of this suit plus interest therein.

2. The Respondent filed its statement of response on 7th March 2017 praying that the Claimants' memorandum of claim dated 10th October 2016 be dismissed with costs to the Respondent

3. Before the hearing, Counsel for the Claimants informed the Court that the 5th Claimant Thomas Mmpanga had withdrawn from the claim.

Claimant's Case

4. The Claimants aver that they were employees of the Respondent from April 2007 working in various Departments and served the Respondent with diligence to its satisfaction.

5. That they were servicing under six months' contracts renewed consistently.

6. It is further averred that in February 2015, the Claimants signed a letter to the management pleading for an increase in their wages in light of the high costs of living. That the letter was delivered by the shop steward. That when the Claimants resumed duty on 25th February 2015, they were addressed by the Supervisor and the shop steward and it was confirmed that management was reviewing the request they had made.

7. It is contended that when the Claimants reported to work on 25th February 2016, they were summoned to the Human Resource Department where they were issued with dismissal letters allegedly for having participated in a strike, which deny.

8. That their dismissal was in breach of the provisions of the Employment Act, 2007, principles of natural justice and the right to fair labour practices and principles in that they were unaware of the alleged strike, no show cause letters were issued and no hearing took place.

Respondent's Case

9. The Respondent's case is pleaded as follows:

10. The Respondent avers that the Claimants, as its employees constantly interrupted the Respondent's operations in various departments.

11. It is admitted that the Claimants were dismissed because they participated in a strike and often left their work places earlier than the assigned time.

12. It is further averred that that Claimants were not diligent and engaged in constant go slows as well as inciting other employees against work. That the Claimants were paid their dues as per the clearance certificates on record and are not entitled to any of the reliefs prayed for.

Evidence

13. CW1 adopted the written statement and testified that all Claimants were employed under six (6) months' contracts renewable every six months. That sometime in February 2015, there were challenges relating to salary increments but there was neither a strike nor stoppage of work. The Witness testified that the Claimants were not given show cause letters or accorded the right to be heard.

14. On cross examination CW1, confirmed that the Claimants were members of the Union and it had been advising them on how to proceed in dealing with the Respondent. That the Claimants worked in the Dry Process Department that had three sub departments.

15. RW1 on the other hand testified that she joined the Respondent in 2015 and relied on the records in the Company's file. That the Claimants had not written any letter to the Respondent on salary increment as alleged.

16. RW1 further testified that the Respondent's pressure system had no problems on 24th February 2015 and the Respondent had a mechanic on site to deal with such cases.

17. The witness told the Court that the employees were on a go slow from 21st to 25th February 2015. That on 25th February 2015 and the Human Resource and Shop Steward, one Mr. Maina addressed the Claimants on resumption of duty but the Claimants were adamant. Others resumed duty. That the management invited them to the office and those found culpable were terminated. That the Claimants signed the discharge vouchers.

18. On cross examination, RW1 confirmed that he had no evidence to prove that the Respondent's compressor had no challenges or that there was a go slow from 21st to 25th February 2015. That the Respondent did not issue the Claimants with a notice to show cause and that there was no record of the disciplinary proceedings. That the Claimants signed the discharge vouchers willingly.

19. RW1 confirmed that the Respondent did not issue a termination notice but was ready and willing to pay in lieu of notice. That the contents of the clearance certificates were explained to the Claimants.

20. Finally, RW1 confirmed that the clearance certificates were for the pay for February 2015.

Claimant's Submissions

21. The Claimants isolated three issues for termination namely:

(i) Whether reason for the Claimants termination were substantiated;

(ii) Whether the Claimants were accorded a fair disciplinary process;

(iii) Whether the Claimants are entitled to the reliefs sought.

22. As regards the reasons for the summary dismissal, it is submitted that the Respondent tendered no evidence that that Claimants boycotted work or left their workplace before time or incited other employees. Section 43 of the Employment Act, 2007 is relied upon to urge that it is the duty of the employer to demonstrate that there was a valid reason(s) to terminate or dismiss an employee.

23. The decisions in **Evans Kamadi Misango v Barclays Bank for Kenya Limited [2015] eKLR** and **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** are also cited to reinforce the submission.

24. It is contended that the alleged reasons for terminating the Claimants' employment were not substantiated.

25. As to whether the Claimants were accorded a fair disciplinary process, it is submitted that the Claimants testimony that they were not subjected to any disciplinary hearing was not controverted and no notices to show cause were issued before the summary dismissal on 25th February 2015. That since the Claimants were not subjected to any disciplinary hearing, they were thus condemned unheard contrary to Section 41 of the Employment Act.

26. The Court of Appeal decision in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** as well as those of Mbaru J. and Ndolo J. in **Mary Chemweno Kiptui v Kenya Pipeline Company [2014] eKLR** and **Donald Odek v Fidelity Security Limited [2012] eKLR** respectively are relied upon to buttress the submission on the essence of the procedural fairness in the termination of employment contracts.

27. On reliefs, it is submitted that all the Claimants except Mr. Thomas Mmpanga who was struck off the suit are entitled to the reliefs sought on account of the unfair, unlawful and inhumane summary dismissal.

Respondent's Submissions

28. The Respondent identified three issues for determination namely; whether the Respondent's dismissal of the Claimants was fair and lawful, whether the Respondent followed the requisite legal procedure when effecting the dismissal and whether the Claimants have justified the reliefs sought.

29. As to whether the dismissal was fair and lawful, the Respondent cites Section 44 of the Employment Act which permits an employer to dismiss an employee summarily for misconduct. It is submitted that the conduct of the Claimant's met the threshold for summary dismissal since they participated in an unlawful go slow which affected production. That the Respondent acted within the provisions of the Employment Act. The decision in **Thomas Sila Nzilo v Bamburi Cement Limited [2014] eKLR** is cited in support of the submission.

30. Section 45 of the Employment Act is relied upon to urge that the termination was not unfair. That the Respondent had valid and fair reasons to dismiss the Claimants since they absented themselves from work and refused to obey the Line Manager. It is submitted that the Respondent has shown that the reasons for the dismissal were justified and fair as required by Section 43(2) of the Act.

31. Relatedly, the procedure envisaged by Section 45(2)(c) was complied. That the Claimants were afforded a chance to explain the allegations raised against them in the presence of their various shop stewards and were dismissed thereafter. The Respondent thus complied with the requirements of Section 41 of the Employment Act.

32. The decision in **Nazareno Kariuki v Feed the Children Kenya [2014] eKLR** is relied upon to demonstrate that the Respondent acted reasonably in the circumstances. The Court of Appeal decision in **Judicial Service Commission v Gladys Boss Shollei [2014] eKLR** was also cited on the issue of reasonableness.

33. As to whether the Claimants have justified the reliefs sought, it is submitted the claim for the salary for February 2015 was untenable since they were paid for the days worked and confirmed so. For the remainder of the contract period, it submitted that since the contract of employment had a termination clause, a claim for compensation for the unexpired period was unsustainable.

34. On 12 months' compensation for wrongful or unfair dismissal, it is submitted that the Claimant's contract spanned six months only was fixed and had a termination clause. The Claimants could not justify loss of earnings. That they were bound by the terms of the contract with the Respondents. The decision in **National Bank of Kenya Limited v Pipeplastic Samkdit (K) Limited & another [2011] eKLR** is relied upon to urge that the Claimants are not entitled to anything more than 28 days' salary.

Determination

35. The issues that commend themselves for determination are: -

- a) Whether the clearance certificates executed by the Claimants discharged the Respondent from liability in relation to the contracts of employment with the Claimants;
- b) Whether the Claimants summary dismissal was unfair/or unlawful;
- c) Whether the Claimants are entitled to the reliefs sought.

36. As regards the import of the clearance certificates, paragraph 12 of the Respondent's statement of response states that "*The Respondent further states that the Claimants cleared with the Respondent company as per the work clearance certificates (see Annexure 1)*". The effect of a clearance certificate is a threshold question and requires disposal at the earliest possible instance due to its impact.

37. There is sufficient jurisprudence on the duty of the Court faced with a discharge voucher/certificate or agreement between an employer and an employee as well as the effect of the agreement on suit.

38. In **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR** the Court of Appeal stated as follows: -

"...it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs."

51. Relatedly, the clearance certificate has no tabulation of the Claimants' entitlements, an essential component of a discharge voucher. Although the Claimants signed the clearance certificates, the Court is not persuaded that they were seized of all the relevant information and knowledge as by law required.

52. In sum, it is the finding of the Court that that clearance certificate signed by the Claimants and attested to by a witness did not waive the Claimants' right to pursue further claims against the Respondent.

53. As to whether the Claimants' summary dismissal was unfair, the Employment Act, 2007 contains elaborate provisions on summary dismissal and termination. Sections 35, 41, 43, 44, 45 and 47(5) of the Employment Act contain elaborate provisions on termination. These provisions set forth infrastructure on termination. Section 45 and 41 of the Employment prescribe the substantive and procedural aspects of termination and courts have studiously enforced these provisions.

54. In **Walter Ogal Anuro v Teachers Service Commission (supra)**, the Court stated that

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason of the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

55. The Court of Appeal was more succinct in **Pius Machafu Isindu v Lavington Security Guards Limited (supra)**

“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.”

Reason(s) for Termination

56. The summary dismissal letter dated 25th February 2015 stated that the Claimants did not resume work after lunch for the afternoon schedule, and 23rd February 2015 after reporting to the work place. That they boycotted work on Monday 24th February 2015 for two hours and the boycott continued on 25th February 2015.

57. Although the Claimants testified that there was neither a strike nor boycott of work on 21st, 24th and 25th, it is evident that there was an impasse between the Claimants and the Respondent on salary matters.

58. RW1 testified that there was a go slow from 21st to 25th and the Human Resource Department and the Shop Steward Mr. Maina, talked to the Claimants to resume work but they declined. The address by the Human Resource Department and Shop Steward was acknowledged by the Claimants. Relatedly, paragraph 5 of the Memorandum of Claim states that the Claimants resumed work on 25th February 2015 and were addressed on the issue.

59. In the totality of the circumstances prevailing on 21st, 23rd, 24th and 25th, it appears to the Court that there was an interruption of work on 21st, 24th and 25th February 2015 and the Claimants were involved. The Claimants testimony that the compressor had no pressure on 21st and 23rd and 24th February 2015 remains unsubstantiated since the Respondent denied it.

60. The Claimant's witness could not explain why the Shop Steward would address employees of an organisation on the unavailability of pressure in a system at the work place. The Court is persuaded that the Claimants were involved in more nefarious activities than they disclosed at the hearing.

61. Section 43(2) for the Employment Act provides that –

“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.”

62. For the foregoing reasons and contrary to the Claimants' submissions, the Court is satisfied that the Respondent has on a balance of probabilities established that it had a justifiable reason to terminate the Claimants' contract of employment on 25th February 2015.

Procedure

63. As mentioned elsewhere in this judgment, Section 41 of the Employment Act prescribes the procedural steps of effecting a lawful and fair termination. The decisions in **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd [2020] eKLR** and **Donald Odek v Fidelity Security Limited (supra)** relied upon by the Claimants elaborate the provisions of Section 41 of the Act.

64. In **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**, Radido J. itemised the specific obligations of the employer with regard to Section 41 of the Employment Act.

65. Needless to emphasize legions of decisions have authoritatively held that noncompliance with the mandatory provisions of Section 41 of the Employment Act renders the termination in question procedurally unfair.

66. The Claimants testified that they were given neither termination nor subjected to a disciplinary process. The Respondent on the other hand testified that the Claimants were taken through a disciplinary process on 25th February 2015 and those found culpable were dismissed. However, the Respondent furnished no evidence of the requisite notice, attendance by the Claimants and their representatives if any, membership of the Disciplinary Committee, hearing and consideration of the Claimants' representations, if any. Instructively RW1 confirmed on cross examination that the entire process was by word of mouth. The Witness was categorical that "*Notice is not an issue, we can pay*".

67. Based on the evidence on record, the Court is testified that the Respondent has not on a balance of probabilities discharged its burden of proof of compliance with Section 41 of the Employment Act.

68. As submitted by the Claimants, the haste with which the Claimants were dismissed inter alia rendered the summary dismissal procedurally defective for noncompliance with Section 41 of the Act.

69. Consequently, it is the finding of the Court that the Claimants dismissal on 25th February 2015 was procedurally unfair for want of procedural propriety.

Reliefs

(a) Declaration that the Claimants' dismissal was unlawful and unfair

70. The Claimant's prayed for a declaration that the Respondent's decision to dismiss them was unlawful and unfair that the Claimants are entitled to payment of terminal dues and compensatory damages.

71. Having found that the Claimants' dismissal was procedurally flawed, a declaration is hereby issued that the Claimants' dismissal was unlawful.

(b) Terminal dues and compensatory damages

(i) Having found that the Respondent did not give the Claimants the requisite termination notice, the Court awards one (1) month's salary in lieu of notice to the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and the 9th Claimants.

(ii) On the salary for February 2015, the Claimant confirmed that the Claimants had been assured that they would be paid the salary for February 2015. Moreover, RW1 stated that the clearance certificate was for the month of February and all Claimants signed the documents. The claim is **declined**.

(iii) Four (4) months' salary for the unexpired period of the contract. This is a claim of anticipatory earnings which courts have refrained from awarding for breach of employment contracts. There is sufficient judicial authority for the foregoing proposition. See **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**. In addition, the contracts on record had a termination clause. Either party could terminate the contract by giving the other party 28 days' notice or pay in lieu of notice. The claim is **declined**.

(iv) Having found that the Claimants' summary dismissal was unfair for noncompliance with the provisions of the Employment Act, 2007, the Claimants are eligible for the discretionary remedy provided by Section 49(1)(c) of the Employment Act subject to compliance with the provisions of Section 49(4) of the Act.

In determining the quantum of compensation, the Court has taken into consideration the following factors:

- The Claimants were serving the Respondent on a six (6) months' contract and had served for less than two months.
- The Claimants substantively contributed to their dismissal.
- The Claimants did not demonstrate their wish to continue serving.

72. For the above reasons, the equivalent of one (1) month's salary is fair.

Conclusion

73. Judgment is entered for the Claimants against the Respondent as follows: -

(a) The Claimants except the 5th Claimant are awarded one (1) month's salary in lieu of notice.

(b) The Claimants except the 5th Claimant are awarded the equivalent of one (1) month's salary as compensation for unfair dismissal.

(c) **The Claimants have costs of this suit.**

(d) **Interest at Court rates from the date of judgment till payment in full.**

74. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE