



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 139 OF 2017

1. MENZA ALFAN MWANGADU
2. MAJIWA KENETH OUMA
3. ALI MKARE OMAR
4. JUMA CHARO MKARE
5. JULIUS KARISA KAINGU
6. MOHAMED MWADZOE JUMA.....CLAIMANTS
7. DENNIS NGOWA CHIGODI
8. STEVE MWANGANGI
9. MKUZI MGALA
10. EZEKIEL MAKALI

VERSUS

BUZEKI ENTERPRISE LTD.....RESPONDENT

J U D G M E N T

1. Vide a Memorandum of Claim dated 14th February 2017 and filed in Court on 17th February 2017, the ten (10) Claimants sued the Respondent and pleaded, *inter alia*:-

- a) that the Claimants were employed by the Respondent on various dates during the year 2015 to work in the Respondent's various departments in various capacities, particulars of which each Claimant pleaded specifically.
- b) that the Claimants used to work for seven (7) days a week, for a minimum of eight (8) hours a day, and sometimes worked overtime hours with little or no compensation for the same.
- c) that although no formal employment contracts were executed between the parties, each of the Claimants retained continuous employment for periods in excess of three (3) months, rendering their employment that of a permanent nature.
- d) that the Respondent paid the Claimants various amounts (in wages), which each Claimant particularized in the Memorandum of Claim, every ten (10) days through Mpesa.
- e) that the Claimants were unlawfully underpaid by the Respondent during the period of employment in contravention of the Labour Institutions Act No. 17 of 2007, the Regulation of Wages (General Amendment) Order, 2013 and Regulation of Wages (General Amendment) Order, 2015.
- f) that the Claimants were forced to work continuously with no rest day and on gazetted public holidays without any

compensation whatsoever.

g) that the Respondent never provided reasonable housing accommodation for each Claimant and never paid sufficient sum to each Claimant as rent, in addition to the wages or salary as would enable the Claimants to obtain reasonable accommodation, contrary to Section 31 of the Employment Act.

h) that the Respondent never allowed the Claimants to take annual leave as by law stipulated, and did not pay the Claimants any amount in lieu of annual leave, contrary to Section 28 of the employment Act.

i) that the Respondent failed to issue the Claimants with written employment contracts, contrary to Section 9 of the Employment contract.

j) that the Respondent did not issue the Claimants with itemized pay statement during their employment, contrary to Section 20 of the Employment Act.

k) that the Claimants were never registered under a pension scheme or a provided fund under the Retirement Benefits Authority, the National Social Security Fund, a gratuity service or Service Scheme established under a collective agreement or any other scheme established by the Respondent.

2. The Claimants further pleaded that on 01/12/2016, the Claimants reported to work as usual but were informed by various officers in the Respondent's management that the company had terminated their respective employment with no proper reason provided for the same. That the Claimants were required to leave the Respondent's premises and not to go back there.

3. The Claimants further pleaded that the termination of their employment was unlawful, abrupt and contravened provisions of the Constitution of Kenya 2010, the rules of natural justice, Labour Laws and International Labour Conventions and Declarations, in that:-

a) termination of the Claimants' employment was without a reason, fair or valid.

b) the Claimants were not accorded a hearing, discussion or dialogue prior to effecting the termination.

c) rules of natural justice were disregarded in terminating the Claimants' employment.

d) no notice was given prior to effecting the termination.

e) the Claimants' terminal dues including service pay for the year worked, were not paid pursuant to termination of employment.

f) the Claimants were not issued with certificates of service upon termination of employment, contrary to Section 51 of the Employment Act.

4. The Claimants filed their evidential documents, numbered as Appendix 1 to Appendix 3, together with their Memorandum of Claim. Their documents include the Claimants' respective M-pesa Statements, 2013 and 2015 wage Orders and the Claimants' advocates demand letter to the Respondent dated 30th January 2017.

5. The Claimants also filed a detailed joint witness statement, which is shown to have been signed by the ten (10) of them on 14th February 2017.

6. The Respondent entered appearance on 9th May 2017 and subsequently filed a Statement of Response on 16th February 2018. The Respondent pleaded, *inter alia*:-

a) that the Claimants were casuals and short term with the Respondent who were contracted on and off every other day as and when their services were required on various diverse dates between 2015 and 2016.

b) that the Claimants were paid their dues every ten (10) days of their services, which payments were made via electronic transfer mobile payment to their phones.

c) that owing to the different nature of their works, the claimants were each paid according to the area of their specialization (which the Respondent listed in his pleadings).

d) that due to limited work and economic conditions, the Claimants were not offered work from about 30th November 2016.

e) that as at the time that work was no longer offered to the Claimants, they had been paid all their dues and nothing was owing and /or outstanding to them from the Respondent.

7. The Respondent denied the Claimants claims, and further stated that the Claimants worked during lawful hours and were remunerated in line with the law, whenever work was offered to them.

8. The Respondent further pleaded that the Claimants were casuals and a case of unlawful termination does not arise. That due to limited work, there was nothing to offer to the Claimants.

9. At paragraph 3 of its statement of Response dated 16th February 2017 and filed in Court on the same date, the Respondent pleaded the Claimants' work specialization as follows:-

- a) **Menza Alfian Mwangandu – Loader/stacker/stores**
- b) **Majiwa Keneth Ouma – Panel Beater**
- c) **Ali Mkare Omar – Cleaner**
- d) **Juma Charo Mkare – Klinker Attendant**
- e) **Julius Karisa Kaingu – Greaser**
- f) **Mohammed Mwazowe Juma – Loader/Stacker/Stores**
- g) **Dennis Gowa Chegodi – Loader/Stacker/Stores**
- h) **Steve Mwangangi Kilonzo – Loader/Stacker/Stores**
- i) **Mkuzi Ngala chiljo – cleaner**
- j) **Ezekiel Makali Kithome – Cleaner**

10. The Respondent also filed a witness statement signed by Macreen Omondi on 28th November 2018. The said witness statement was filed in court on 29th November 2018, and in it was stated and demonstrated that the Claimants had, indeed been appointed by the Respondent on various dates during the year 2015, and that all of them had been stopped (terminated) on 30th November 2016. The Claimants daily wages were shown by the Respondent to have been as follows:-

- a) 1st Claimant - ksh.484
- b) 2nd Claimant - ksh.700
- c) 3rd Claimant - ksh.450
- d) 4th Claimant - ksh. 484
- e) 5th Claimant - ksh. 484
- f) 6th Claimant - ksh. 484
- g) 7th Claimant - ksh. 484
- h) 8th Claimant - ksh. 484
- i) 9th Claimant - ksh. 450
- j) 10th Claimant - ksh. 484

11. When the matter came up for hearing on 19/9/2021, only the Claimants and their counsel appeared, and being satisfied that the Respondent's counsel had been duly served with a hearing notice via email and an affidavit of service in that regard duly filed in Court (on 27th September 2021), I allowed the Claimants to proceed with the hearing.

12. The Claimants called one witness, Dennis Ngowa Chigodi, the 7th Claimant, who testified on behalf of all the ten (10) Claimants. The witness (CW1) adopted the detailed witness statement referred to in paragraph 5 of this judgment as his sworn evidence. He also produced as exhibits the documents filed together with the Memorandum of Claim. Those documents are referred to in paragraph 4 of this judgment. He prayed for judgment as prayed in the Memorandum of Claim. The Claimants' case was thereupon closed. The defence case was also ordered closed.

13. The Claimants were directed by the Court to file written submissions and to serve the same on the Respondent's counsel. This was eventually done, and an affidavit of service was filed.

14. In view of the pleadings filed and in particular the Respondent's admission that it had employed (appointed) the Claimants during the year 2015 and having terminated them on 30th November 2016, issues for determination appear to me to be as follows:-

a) Whether the Claimants' employment could be terminated without giving notice.

b) Whether termination of the Claimants' employment was unfair.

c) Whether the Claimants are entitled to the reliefs sought.

15. On the first issue, the Claimant's witness (CW1) testified that all the Claimants were employed by the Respondent in early January 2015 and that their services were terminated on 1st December 2016. The Respondent admitted in its Statement of Response that it had contracted the Claimants on diverse dates between 2015 and 2016. Parties are always bound by their pleadings.

16. The Respondent, did not attend Court for hearing and therefore did not testify and did not controvert or rebut the Claimants' evidence. The Claimants' pleading and evidence that they worked for the Respondent from early January 2015 to 30th November 2016 stands unchallenged.

17. The Claimants testified that they worked for the Respondent continuously from early January 2015 upto 30th November 2016, for a period of almost two (2) years. Pursuant to Section 35 (1) (c) of the Employment Act, the claimants' employment contracts were terminable by either party giving a twenty eight days written notice. Their employment could not, therefore, be terminated without giving notice.

18. Further, the Claimants demonstrated that they had been continuously employed by the respondent for a period not less than thirteen months immediately before the date of termination, and that they had the right to complain that they were unfairly terminated pursuant to Section 45(3) of the Employment Act.

19. On the second issue, the Claimant's pleaded and testified that on 1st December 2016 they reported to work as usual but were informed by various officers in the Respondent's management that their employment had been terminated, and that no proper reason was given for the termination. Section 41 of the Employment Act provides in mandatory terms:-

(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 reasons 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.

(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 representation 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."

20. Section 45 of the Employment Act on the other hand provides, again in mandatory terms, that no employer shall terminate the employment of an employee unfairly. The section goes further and states that termination of an employee's employment is unfair if the employer fails to prove that the reason for the termination is valid and fair; and is related to the employee's conduct, capacity or compatibility. An employer must also prove that termination was done in accordance with fair procedure.

21. In the present case, the employer did not comply with the mandatory procedure set out in Section 41 of the Employment Act, and did not demonstrate that the reason for terminating the Claimants' contracts of employment was valid. The termination therefore fails both the procedural and substantive test. It was unfair. The Court of Appeal held in the case of NATIONAL BANK OF KENYA -VS- SAMUEL NGURU MUTONYA [2019] eKLR that failure to comply with the provisions of section 41 of the Employment Act rendered termination of employment unfair, and entitled the Claimant to compensation.

22. On the third issue, it is my finding that the claimants are entitled to the reliefs sought, having proved their claims on a balance of probability. The Claimants demonstrated, on a balance of probability, that they had been underpaid during the period of employment, contrary to 2013 and 2015 Wage Regulation Orders. I therefore make the following awards, as pleaded, prayed and proved by the Claimants:-

a) Menza Alfian Mwangadu

(i) One month salary in lieu of notice (811.20x30)...ksh.....24,336

(ii) Accumulated leave days

(Ksh.811.20x27 days) kshs.....13,068

(iii) Total underpayment ksh.....237,414

(iv) Service pay for one complete year of

service ksh.....12,168

(v) Six months salary for unfair termination of employment (811.20x30x6 years).....146,016

TOTAL.....ksh.433,002

b) Majiwa Keneth Ouma

(i) One month salary in lieu of notice (711x30).....21,330

(ii) Accumulated leave days (711x27 days)..ksh....19,197

(iii) Total underpayment ksh..... 6,270

(iv) Service Pay for one complete year

of service.....10,665

(v) Six months salary being compensation for unfair termination.....127,980

Totalkshs.185,442

c) Ali Mkare Omar

(i) One month salary in lieu of notice

(527.10x30).....15,813.70

(ii) Accumulated leave days(ksh.527.10x27 days)14,231.70

(iii) Total underpayment ksh64,419.00

(iv) Service pay at the rate of 15 days for one completed year of
7,906.50

(v) Six months salary being compensation for unfair termination94,878.00

TOTAL.....Kshs.197,248.00

d) Juma Charo Mkare

(i) One month salary in lieu of notice (KSH.527.10X30)
.....15,813.00

(ii) Accumulated leave days (27 days).....14,230.70

(iii) Total underpayment.....45,039.00

(iv) Service pay for one completed year of

service ksh.....7,906.50

(v) Six months salary being compensation for unlawful termination of employmentksh.94,878.00

Totalksh.177,868.00

e) Julius Karisa Kaingu

(i) One month salary in lieu of

notice (ksh.711x30)21,330.00

(ii) Payment for accumulated leave

days (27 days).....19,197.00

(iii) total underpayment	169,572.00
(iv) Service pay for one completed year of service ksh.....	10,665.00
(v) Six months salary being compensation for unfair termination.....ksh.....	<u>127,980.00</u>
Total	<u>ksh.348,744.00</u>

f) Mohammed Mwadzowe Juma

(i) One month salary in lieu of notice (711x30).....	21,330.00
(ii) Accumulated leave days during the period of service (27 days).....	19,197.00
(iii) Total underpayment	147,492.00
(iv) Service pay for one completed year of service.....	10,665.00
(v) Six months salary being compensation for unfair termination of employment	<u>ksh.127,480.00</u>
Total	<u>ksh.326,164.00</u>

g) Dennis Gowa Chigodi

(i) One month salary in lieu of notice (ksh.811.20x30 days)	24,336.00
(ii) Accumulated leave pay (27 days).....	21,902.00
(iii) Total underpayments	237,414.00
(iv) Service pay for one completed year of service ksh.	12,168.00
(v) Six months salary being compensation for unfair termination of employment ksh.....	<u>146,016.00</u>
Total	<u>ksh.441,836.00</u>

h) Majiwa Kanneth Ouma

(i) One month salary in lieu of notice (527.10x30).....	15,813.00
(ii) Accumulated leave days during the period of employment (27 days).....	14,231.70
(iii) Total underpayment	64,419.00
(iv) Service pay for one completed year of service	7,906.50
(v) Six months salary being compensation for unfair termination of employment.....	<u>94,878.00</u>
(vi) Total	<u>ksh.197,248.20</u>

i) Steve Mwangangi Kilonzo

(i) One month salary in lieu of

notice (ksh.527.10x30).....ksh.15,813.00

(ii) Accumulated leave days during the period of employment (27 days).....14,231.70

(iii) Total underpayment64,419.00

(iv) Service pay for one completed year
of service7,906.50

(v) Six months salary being compensation for unfair termination of employmentKsh.94,878.50

Total.....ksh.197,248.00

j) Mkuzi Mgala Chulejo

(i) One month salary in lieu of
notice (711x30).....21,330.00

(ii) Accumulated leave days during the period of service (27 days)19,197.00

(iii) Total underpayment.....147,492.00

(iv) Service pay for one completed
year of service10,665.00

(v) Six months salary being compensation for unfair termination.....127,980.00

Totalksh.326,664.00

23. Consequently, judgment is hereby entered against the Respondent in favour of the Claimants for a total sum of ksh**2,831,464.20**

24. The Claimants are also awarded costs of the suit and interest at Court rates from the date of this judgment until payment in full.

25. The Respondent is directed to issue each of the Claimants with a Certificate of Service pursuant to Section 51(1) of the Employment Act within four five (45) days of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Wanyama for Claimant

No Appearance Respondent