



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1533 OF 2011

YUSUF OMONDI.....1ST CLAIMANT

CLARIS ATIENO.....2ND CLAIMANT

TIMOTHY AYIEKO.....3RD CLAIMANT

ROSE KATUMBI.....4TH CLAIMANT

MESHACK AMIATI OKOTI.....5TH CLAIMANT

VERSUS

MAKINI SCHOOLS LIMITED.....RESPONDENT

JUDGMENT

1. The suit commenced on 9th September, 2011 in which the claimants pray for the following reliefs:-

(a) Terminal benefits in the sum of Kshs 625,000, 759,000, 750,000, 2,295,000; 850,375.00 and 850,375.000 as set out in paragraph 11 of the Statement of Claim.

(b) Costs of the suit.

(c) Any other relief as the Court may deem fit to grant.

2. The particulars of the five (5) claimants are set out under paragraphs 1 to 5 of the Statement of Claim and elaborated in the witness statements of the 5 claimants filed together with the statement of claim on 9th September, 2011.

3. As per a consent dated 24/6/2020 by the parties the witness statements were adopted as the evidence in chief in this matter and the list of documents produced as exhibits in support of the positions by the parties. The parties then agreed to file final submissions having dispensed with oral hearing by the parties.

The Claim

4. The facts of the claimants' case is that the claimants were employed by the respondent on diverse dates as set out in the Statement of Claim and in the witness statements as follows:

(i) Yusuf Omondi

Was employed on 14/5/2002 at a monthly salary of Kshs 16,650. He worked as a driver. He worked diligently for 7 years until he was called by the Human Resource Manager Mr. Godrick Arthur to his office and forced to sign a letter of resignation on the promise that he would be paid terminal benefits. That upon resignation, the respondent has defaulted to pay the terminal benefits to date including:-

(a) Service pay for 17 years at 15 days salary for each completed year of service Kshs 66,000.

(b) 3 months' salary in lieu of notice Kshs 21,999.

(c) Salary for January, 2010 – Kshs 11,000.

(d) Responsibility allowance of Kshs 2,000 for 91 months

Kshs 33,000.

(e) Unpaid overtime worked at 3 hours daily for 7 years – Kshs 11,000.

(f) Payment in lieu of leave not taken in 2010 – Kshs 16,650.

Total: Kshs 625,759.

(ii) CLARIS ATIENO

The 2nd claimant was employed as a general worker on 8th October, 2001 and worked diligently until he received a letter from the Human Resource Manager Mr. Godrick Arthur Itur on 11/11/2009 sending him on Compulsory Leave for alleged theft of food stuffs. The claimant denied the allegation but after three days his employment was terminated without any valid reason or fair procedure followed. The claimant has not been paid terminal benefits to date including:-

(a) Salary for November, 2009 – Kshs 12,000

(b) Service pay for 8 years at 15 days salary for each completed year of service – Kshs 48,000

(c) Unpaid responsibility allowance at Kshs 2,000 per month for 8 years, Kshs 192,000.

(d) Notice pay for 3 months – 36,000

(e) Unpaid overtime of 3 hours daily – Kshs 438,000

(f) Unpaid leave allowance for the year 2009 and 2010 – Kshs 12,000

Total : Kshs. 750,000.

(iii) Timothy Ayieko

The 3rd claimant was employed by the respondent as a driver on 1st July, 1996. He worked diligently for 14 years until the 9th February, 2010 when he was issued a letter of termination by Mr. Arthur without notice, valid reason and without fair procedure. The claimant was not paid terminal benefits including:-

(a) Service pay for the years 14 years @ 15 days salary for each completed year of service – Kshs 109,830.

(b) Salary for February, 2010 – Kshs 15,700.

(c) 3 months' notice pay – Kshs 47,100

(d) Unpaid responsibility allowance @ Kshs 2,500 per month for the 14 years Kshs 420,000.

(e) Unpaid overtime at 5 hours a day for 14 years – Kshs 1,670,970.

(f) Unpaid leave allowance for 2009 and 2010 – Kshs 31,400

Total: Kshs 2,295,000.

(iv) Rose Katumbi

The 4th claimant was employed as a general worker by the respondent on 8th January, 1995. She worked diligently for 14 years until the 11/11/2009 when she received a letter from Arthur sending her on compulsory leave for alleged theft of food stuffs. The claimant denied the allegations and her employment was terminated without notice and or any fair hearing. She was not paid any terminal benefits including:-

(a) Service pay at 5 days salary for each completed year of service for 14 years in the sum of 105,000.

(b) November, 2009 salary – Kshs 15,000.

(c) 3 months' salary in lieu of notice – Kshs 45,000

(d) Overtime for a period of 14 years – Kshs 319,375.

(e) Unpaid leave allowance for the year 2009 and 2010 – Kshs 30,000.

(f) Responsibility allowance – Kshs 336,000

Total: Kshs 850,375.

(v) Meshack Amiati Okoti

The 5th claimant was employed by the respondent as a cashier at the bookshop, canteen and bus duty on 1/4/1997. He worked diligently for 13 years until 13/11/2009 when he received a letter from Arthur sending him on compulsory leave for alleged theft of food stuff. The claimant denied the charge but his employment was terminated without notice or any hearing. The claimant was not paid terminal benefits including:-

(a) Notice pay of 3 months – Kshs 42,000

(b) Unpaid leave allowance from 2009 and 2010 – Kshs 28,000

(c) Unpaid responsibility allowance @ 2,000 – Kshs per month for 13 years – Kshs312,000

(d) Service pay @ 15 days salary for each completed year of service – Kshs 90,9999.

(e) Unpaid overtime – Kshs 3,807,071.

Total claim – Kshs 4,280,070.

5. The five (5) claimants rely on list of documents attached to the claim which include the letters of termination and compulsory leave referred to above.

6. The claimants also produced demand notice from their advocate dated 22/3/2010 which was not heeded by the respondent. The claimants pray that they be awarded as prayed.

Reply

7. The respondent filed a reply to the Memorandum of Claim dated 20/1/2012 in which the respondent admits that the claimants were their employees in the capacities described and have produced the various letters of their appointment.

8. With respect to 1st claimant, the respondent states that the 1st claimant's terminal dues upon his voluntary resignation were tabulated as per annexure III to the response as follows:-

(a) Salary for days worked upto 23rd January, at Kshs 12,808.

(b) Service pay for 7 completed years of service – Kshs

58,275.

(c) Less one month salary in lieu of notice at Kshs 16,650.

Gross amount – Kshs 54,43.00

9. That the terminal dues payable were offset against an outstanding Sacco loan of Kshs 120,213 and therefore the 1st claimant still owed the Sacco Kshs 77,355 as at the time of his resignation. The computation was done on 21/10/2011.

10. With regard to the 2nd claimant, the respondent testified that the employment of the 2nd claimant was terminated by a letter dated 11/11/2009 for alleged theft of foodstuffs. The respondent produced computation of final dues of the 2nd claimant as follows:-

(a) One month in lieu of notice – Kshs 12,100.

(b) Salary for 13 days worked in November, 2009 – Kshs 5,585.

(c) Payment in lieu of outstanding leave days – Kshs 5,119.00

(d) Service pay for 8 completed years – Kshs 48,400.

Total Kshs 71,200

11. That the 2nd claimant was paid net terminal benefits of Kshs 61,198 after deductions of Pay As You Earn (PAYE).

12. In respect of the 3rd claimant, Timonty Ayieko, the respondent adduced evidence that the 3rd claimant was summarily dismissed by a letter dated 19/2/2010. The letter of summary dismissal was produced as an exhibit before Court. The 3rd claimant had reported to work under the influence of alcohol.

13. The respondent produced Tabulation of final dues for the 3rd claimant as follows:-

(a) One month salary in lieu of notice – Kshs 18,200.

(b) Salary for 8 days worked in February, 2010 – kshs 4,900.

(c) Service pay for 13 years completed service – Kshs 118,300.

Total Kshs 141,400.

14. The 3rd claimant was paid Kshs 111,001 upon deduction of Pay As You Earn (PAYE) in the sum of Kshs 30,391. The tabulation was done on 21/10/2011.

15. The respondent adduced evidence with respect to Rose Katumbi the 4th claimant that her employment was terminated by a letter dated 12/11/2009 for theft of foodstuffs from the school. The letter of termination was produced as an exhibit.

16. The respondent produced tabulation of final dues of the 4th claimant dated 2/10/2011 as follows:-

(a) One month salary in lieu of notice – Kshs 15,000

(b) 13 days salary for days worked in November, 2009 – Kshs 6,923.

(c) Payment in lieu of 3 days of leave not taken – Kshs 731.

(d) Service pay for completed year of service – 97,500.

Total payment –Kshs 121,154.

17. That the claimant was paid Kshs 95,983 net pay upon deduction of the PAYE in the sum of Kshs 23,671,

18. Finally with respect to the 5th claimant Meshack Okoti, the respondent adduced evidence that the employment of the claimant was terminated on 12th November, 2009 for theft of food stuffs from the school.

19. The respondent produced tabulation of terminal benefits paid to the claimant as follows:-

(a) Notice pay – Kshs 12,100

(b) Salary for 13 days worked in November, 2009 – Kshs 5,585.

(c) Payment in lieu of 11 days leave not taken – Kshs 51119.

(d) Service pay for 8 years completed service – Kshs 71,204.

Total paid Kshs 61,198 upon deduction of PAYE in the sum of Kshs 8,506.

20. The parties filed final submissions dated 24/11/2021 and 27/11/2021 respectively which the Court has carefully considered together with the documentary evidence adduced by the parties.

Determination

20. *The issues for determination are:-*

(a) Whether the claimants have proved their claims on a balance of probabilities.

(b) Whether the claimants are entitled to the reliefs sought.

21. The claimants presented the various claims set out in their evidence which claims are denied by the respondent. The claimants state that they were not paid any terminal benefits upon termination of the employment by the respondent on diverse days. The evidence by the claimants has been discredited by the documentary evidence produced by the respondent indicating that their terminal dues were duly calculated and paid as on 21st October, 2011.

22. The claimants have been unable to demonstrate that they were entitled to payment in lieu of three months' notice. They did not acknowledge that they had already been paid in lieu of one month notice except the first claimant who had resigned from employment and had instead to pay the respondent one month salary in lieu of notice. This is the lawful statutory notice unless there is a written contract providing for better notice payable to the employees. The claimants did not provide any such contract.

23. The claimants had the onus of proving that they were entitled to payment of responsibility allowance; and overtime. All the claimants did not sufficiently demonstrate that they had a contract of employment that entitled them to payment of responsibility allowance. The claimants did not equally demonstrate that they had at all material times done overtime and were not paid by the respondent. There is no correspondence produced by any of the claimants demanding payment of overtime before termination of their employment. These claims are an afterthought and the evidence by the claimants in this regard is not credible at all.

24. Accordingly, the claimants have failed to satisfy the requirements of Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya by proving their claims on a balance of probabilities.

25. The statement of claim filed on 9th September, 2011 and dated 5th September, 2011 has no claims for compensation for unlawful dismissal. Indeed, the particulars of each claimant set out under paragraph 8 are in respect of payment of terminal benefits. The issue of unlawful dismissal and or termination of employment does not arise at all in this suit as was implied in the final submissions by the parties.

26. In the final analysis, the entire suit by the claimants lack merit and is dismissed with no order as to costs considering the meagre earnings by the claimants whilst they worked for the respondent for reasonably long periods.

27. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 3RD DAY OF FEBRUARY, 2022

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Mworira for claimants

Mrs Khayesi for Respondent

Ekale – Court clerk