



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 547 OF 2017**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**ROBERT MUNGAL..... 1<sup>ST</sup> CLAIMANT**  
**ANTHONY IMBWAGA SHIBWAYIA .....2<sup>ND</sup> CLAIMANT**  
**ONESMUS MWOMBOI .....3<sup>RD</sup> CLAIMANT**  
**ELISHA OKINDA .....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**LANDMRK HOLDINGS LIMITED.....RESPONDENT**

**JUDGMENT**

1. By a statement of claim dated 20<sup>th</sup> March 2017 and filed on 20<sup>th</sup> March 2017, the Claimants sued the Respondent alleging that they were employed by the Respondent on diverse days and years as driver, storekeeper, turnboy and forklift operator respectively with different salaries and reporting times.

2. The Claimants aver that they served diligently and dutifully until they were unlawfully terminated on diverse dates without notice or letters to show cause or hearing. That the Respondent refused to pay terminal dues.

3. The Claimant prays for the following reliefs –

**(a)** A declaration that the Claimants’ termination from their employment was unfair.

**(b)** Terminal dues totalling Kshs.3,691,033.70 as tabulated below

**(1) ROBERT MUNGAI**

(i) One (1) month’s salary in lieu of notice Kshs.23,920

(ii) Leave for 2 years Kshs.38,640

(iii) Service gratuity at 15 days per year Kshs.27,600

(iv) House allowance at 15% for

28 months Kshs.87,360

(v) Overtime 4 hours x 6 days x 4 hours x 28 months

x 115 hourly rate Kshs.309,120

(vi) 12 months compensation Kshs.287,040

**Total Kshs.773,680**

**(2) ANTHONY IMBWAGA SHIBWAYIA**

(i) One (1) month's salary in lieu of notice Kshs.23,920

(ii) Two weeks salary () x 14 Kshs.12,880

(iii) Leave for 2 years () x 21 Kshs.38,640

(iv) Overtime 4 hours x 6 days x 4 hours x 24 months

x 115 hourly rate Kshs.264,960

(v) House allowance at 15% Kshs.74,880

(vi) Transport allowance Kshs.6,000

(vii) 12 months compensation Kshs.287,040

**Total Kshs.735,920**

**(3) ONESMUS MWOMBOI**

(i) One (1) month's salary in lieu of notice Kshs.29,433.1

(ii) Leave for 2 years () x 21 x 2 Kshs.47,545.80

(iii) Service gratuity at 15 days per year Kshs.33,961.30

(iv) Overtime 5 hours x 6 days x 4 hours x 24 months

x 141.5 hourly rate Kshs.407,520.00

(v) House allowance at 15% Kshs.92,138.40

(vi) 12 months compensation Kshs.353,197.20

**Total Kshs.963,795.80**

**(4) JOSPHAT MARANDU**

(i) One (1) month's salary in lieu of notice Kshs.18,181.50

(ii) Leave for one year Kshs.14,685.10

(iii) Service gratuity at 15 days per year Kshs.10,489.30

(iv) House allowance Kshs.37,944.00

(v) 12 months compensation Kshs.218,178.00

**Total Kshs.299,477.90**

**(5) ELISHA OKINDA**

(i) One (1) month's salary in lieu of notice Kshs.23,920

(ii) Leave for 3 years Kshs.57,960

(iii) Service gratuity at 15 days per year Kshs.41,400

(iv) Overtime 4 hours x 6 days x 4 weeks x 46 months

x 115 hourly rate Kshs.507,840

(v) 12 months compensation Kshs.287,040

**Kshs.918,160**

**GRAND TOTAL Kshs.3,691,033.70**

(c) Certificate of service

(d) Costs of this suit and interest.

4. The Respondent filed its memorandum of response on 25<sup>th</sup> April 2017. The Respondent denies the contents of paragraphs 3 and 4 of the statement of claim and avers that the Claimants stole its goods namely 20 bags and cement and 110 pieces of machine cut stones and the theft was reported at Lodwar Police Station under OB/25/01/2016. That the Claimants admitted wrongdoing and apologised in writing. Robert Muigai, the 1<sup>st</sup> Claimant admitted wrong doing.

5. That the 3<sup>rd</sup> and 4<sup>th</sup> Claimant received their dues in full settlement of their terminal dues.

6. It is also averred that by their conduct, the Claimants breached their fundamental obligations and were thus eligible for summary dismissal.

7. The Respondent prays for dismissal of the claim with costs.

#### **Evidence**

8. The case was heard in 16<sup>th</sup> November 2021. Both parties had one (1) witness each. Mr. Anthony Imbwaga Shilbwayia testified on behalf of Robert Muigai, Onesmus Mwamboi Josphat Marandu and Elisha Okinda. The letter of authority is dated 20<sup>th</sup> March 2017.

9. CW1, Mr. Antony Imbwaga adopted the witness statement and was cross-examined. He testified that he was engaged by the Respondent as a driver on 10<sup>th</sup> February 2014 at Kshs.800 per day without house allowance. That the other Claimants were employed in various capacities, and earning different salaries. That none of the Claimants went on leave during their employment and they used to work overtime and were not paid for the extra hours. That he was entitled to transport allowance.

10. On cross-examination, CW1 confirmed that none of the Claimants had an appointment letter and only the witness had an employment card staff number. None had a payslip from the employer or termination letter. That they were being paid weekly. The witness testified that Mr. Robert Mungai's salary was Kshs.800/- per day and Onesmus Mwamboi, a storekeeper had a monthly salary of Kshs.25,000/-. Josephat Marandu's salary was Kshs.15,810/- per month. Elisha Okinda was paid Kshs.800/- per day.

11. CW1 confirmed that Onesmus Mwamboi was paid Kshs.71,600/- as terminal dues and accepted the same in full settlement as was Elisha Okinda. That Robert Mungai and Josephat Marandu are yet to be paid.

12. RW1, Mr. Stephen Kamau adopted the witness statement and was cross-examined. The witness confirmed that Mr. Muigai was paid in May 2018 and was dismissed for having delivered less goods than he was supposed to deliver. That Mr. Anthony Imbwaga had declined payment.

13. On re-examination, the witness confirmed that the Claimants were paid as follows:

Elisha Okinda Kshs.1,200/-

Anthony Imbwaga Kshs.800/-

Robert Muigai Kshs.800/- per day

Onesmus Mwamboi Kshs.....

Josepha Marandu Kshs. 527/-

#### **Claimant's Submission**

14. The Claimant identifies the issues for determination as whether;

i) The Respondent had a valid reason to terminate the Claimants from employment;

ii) The Respondent observed procedural fairness principles in the termination.

iii) The Claimants are entitled to the terminal benefits sought.

15. As regards the reasons for termination the Claimants rely on Section 43 of the Employment Act, 2007 to urge that the Claimants were terminated on diverse days without any reason. That the Respondent's allegation that the Claimants were involved in criminal behaviour was not supported by statements recorded by the police.

16. It is submitted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants were not given reasons for their termination.

17. It is further submitted that the Respondent did not file the results of the investigation conducted by the police or whether the Claimants were charged in Court. That the Claimants were not taken through a disciplinary hearing as required by law. Reliance is made on **Section 41** of the **Employment Act** (cited as Section 42).

18. As to whether the Claimants are entitled to terminal dues it is submitted that they are entitled to all the reliefs prayed for in the Statement of Claim.

### **Respondent's Submission**

19. The Respondent submits that the Claimants were casual labourers paid a daily wage as follows:

1<sup>st</sup> Claimant Kshs.800/- per day

2<sup>nd</sup> Claimant Kshs.800/- per day

3<sup>rd</sup> Claimant Kshs.527/- per day

4<sup>th</sup> Claimant Kshs.1,200/- per day

20. That there were only four (4) Claimants not 5 as the CW1 testified. According to the Respondent the issues for determination are whether:

(a) The termination of employment of the Claimants was unlawful;

(b) The Claimants are entitled to the terminal benefits sought.

21. As to whether the termination was unlawful, reliance is made on **section 47(5)** of the **Employment Act** to urge that the Claimants had failed to prove that their termination was unfair.

22. It is submitted that the Claimants were casual labourers and CW1 admitted in Court that he had no evidence to show that they were in fact employees of the Respondent company.

23. That the Claimants stole 20 bags of cement and the theft was reported at Lodwar Police Station and the matter was still ongoing. That the 2<sup>nd</sup> Claimant Anthony Imbwaga and his turnboy Josephat Marandu were aware of the theft.

24. It is further submitted that the Claimants were summarily dismissed for gross misconduct as provided by **Section 44(4)(g)** of the **Employment Act**. Reliance is made on the decision in **Thomas Sila Nzivo v Bamburi Cement Ltd [2014] eKLR** to urge that the Respondent had sufficient grounds to suspect that the Claimants had acted to its detriment.

25. It is the Respondent's submission that the Claimant breached their trust and irretrievably broke down that relationship with the Respondent and were relieved of their duties by word of mouth.

26. It submitted that the Claimants were dismissed for gross misconduct.

27. As to whether the Claimants are entitled to the terminal dues sought, the Respondent submits that the Claimants are not entitled to the reliefs sought since the terminal benefits of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants were paid in full and the issue of costs does not arise. The decision in **Naqvi Syed Omar v Paramount Bank Ltd & another [2015] eKLR** is relied upon to urge that where an employer suspects an employee of stealing or an employee carelessly or improperly performs his role, the employer has the right to summarily dismiss the employee as was in the instant case.

28. It is also submitted that CW1 admitted on cross-examination that the 3<sup>rd</sup> Claimant was paid Kshs.71,600/- as final and full payment under payment voucher no. **047923** dated 30<sup>th</sup> January 2017.

29. That the 4<sup>th</sup> Claimant confirms by letter dated 16<sup>th</sup> December 2016 that he received final payment from the Respondent. The 3<sup>rd</sup> Claimant confirmed that he had received his dues and had no claim against the Respondent. It is contended that all Claimants **were** paid

other than the 2<sup>nd</sup> Claimant as RW1 testified.

30. Finally, it is submitted that the 2<sup>nd</sup> Claimant's prayers for pay in lieu of notice, leave days, service gratuity, overtime, house allowance and compensation have not been substantiated. Relatedly, the 2<sup>nd</sup> Claimant was a casual employee of the Respondent.

### **Findings and Determination**

31. From the pleadings, evidence on record, submissions and the law, the issues for determination are:

- (i) Whether the Claimants were employees of the Respondent and nature of employment;
- (ii) Whether the Claimants' termination was unfair;
- (iii) Whether the Claimants are entitled to the reliefs sought.
- (iv) Effect of the discharge letter/voucher executed by the 3<sup>rd</sup> and 5<sup>th</sup> Claimants.

32. As to whether the Claimants were employees of the Respondent, the Claimants testified through **Mr. Anthony Imbwaga Shibwayia** (CW1) who told the Court that the five (5) Claimants, Mungai, Onesmus Marandu, and Elisha Okinda were employees of the Respondent. He conceded he had no documentary or other evidence to demonstrate the same. It was his testimony that they were permanent employees but again had nothing to prove this allegation. He admitted he had no employment card or staff number. Only Mr. Joseph Marandu had a staff number.

33. Although the witness attempted to testify on the Claimants salaries, he was unable to since he appeared unaware of the individual salaries and could only read the pleadings. He could not remember when the Claimants were employed or their designation. Be that as it may, the Respondent admitted that the Claimants were its casual employees on daily wages as follows: Josphat Marandu Kshs.527/-, Elisha Okinda Kshs1,200/- Robert Mungai Kshs.800/-, Onesmus Anthony Imbwaga Kshs.800/-. The daily wage of Onesmus Mwomboi is unclear from the evidence adduced before the Court.

34. The Claimants led no evidence to establish that they were permanent employees of the Respondent or that their daily wage excluded house allowance. This would have been decipherable if there was a claim for underpayment under the relevant Regulation of Wages Order.

35. As to whether the Claimants termination was unfair, the Claimants submit that they were terminated on diverse dates without any reason. The dates are unknown as are the circumstances in which the dismissal or termination took place.

36. The Respondent allege that the Claimant participated in criminal activities and an occurrence book record was provided, but no statements were availed. More importantly the alleged theft of bags of cement relate to Robert Mungai, the 1<sup>st</sup> Claimant and one Dennis Mwati who is not a Claimant. The two wrote apology letters to the Director of the Respondent.

37. RW1 testified that Anthony Imbwaga was also involved in the alleged theft reported at the Lodwar Police Station. The two were dismissed for the alleged criminal activities.

38. From the evidence in record, it is unclear how the 3<sup>rd</sup> and 4<sup>th</sup> Claimants were terminated or dismissed and why Elisha Okinda was allegedly declared redundant on 3<sup>rd</sup> August 2016 as the letter on record attests. However, no evidence was led on compliance with the provisions of **Section 40** of the **Employment Act 2007** on redundancy. The purported redundancy of Elisha Okinda, the 5<sup>th</sup> Claimant amounted to an unfair termination under section 45 of the Act. The Respondent did not contest the contents of the letter dated 30<sup>th</sup> August 2016.

39. Section 47(5) of the Employment Act provides that:

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

40. From the evidence on record, the 3<sup>rd</sup> and 4<sup>th</sup> Claimant have a balance of probabilities not established that their termination of employment was unfair.

41. For the 1<sup>st</sup> and 2<sup>nd</sup> Claimants, notice of termination should have been given in accordance with **Section 41** of the **Employment Act** and in the case of the 5<sup>th</sup> Claimant the Provisions of **Section 40** of the **Employment Act** should have been strictly complied with. It therefore follows that the termination of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Claimants was unfair.

### **Reliefs**

42. All the Claimants prayed for a host of reliefs. The entire list is as follows:

- (i) Leave pay for years served

- (ii) Service gratuity
- (iii) Overtime Pay
- (iv) House allowance
- (v) Transport allowance

43. The Court finds itself in an unenviable situation where it is called upon to award a host of allowances and payments and yet no scintilla of evidence to establish any of them was tendered by the Claimants. Without a letter of appointment, payslip, NSSF statements, bank statements or any other document including a basic staff number coupled with the want of cogent evidence of the duties performed on a daily basis including reporting and exit times as well as mode of payment of wages, it would appear to follow that all the prayers are for dismissal. In other words, the Claimants have articulated figures for the Court to award without providing the necessary evidential material support.

44. As a consequence of the foregoing the claims for leave pay, service gratuity, house allowance, overtime and transport allowance are declined for want of proof.

45. On compensation under **Section 49** of the **Employment Act**, having found that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Claimants were unfairly terminated, each is awarded the equivalent of one (1) month's salary in lieu of notice and the equivalent of two (2) months' salary as compensation for the 1<sup>st</sup> and 2<sup>nd</sup> Claimants.

46. As regards the effect discharge voucher or settlement agreement, it is common ground that Mr. Onesmus Muthami Mwomboi and Elisha Okinda executed agreements with the Respondents as follows:

*“TO WHOM IT MAY CONCERN*

*AGREEMENT FOR FULL AND FINAL SETTLEMENT FOR ONESMUS MUTHAMI MWOMBOI HOLDER OF NATIONAL ID. 24484142”*

*Reference is made to the agreement for terminal dues settlement to the above-named.*

*Below herewith is the final account for the above named Onesmus Muthami Mwomboi which has been settled as follows:*

- a) Salary payment made up to date – no dues claimed.*
- b) Notice fully paid and settled – no dues claimed.*
- c) Annual leave for two (2) years – all leave days settled and paid – no dues claimed.*
- d) Service all fully paid and settled – no dues claimed.*
- e) Overtime – all fully paid and settled- no dues claimed.*
- f) Weekly rest days – all paid – no dues claimed.*
- g) Public holidays – Payment for those days have been remitted to the employees when due – no dues claimed.*
- h) Housing allowance – The employees were provided for houses including water and electricity facilities – no dues claimed.*

*Onesmus Muthami Mwomboi agrees that NO CLAIMS WHATSOEVER shall be forwarded thereafter after the above payment has been remitted.*

*Thanking you*

*LANDMARK HOLDINGS LTD*

*Signed*

*ACCOUNTS DEPARTMENT*

*ACKNOWLEDGEMENT:*

*All the above has been read and understood by Onesmus Muthami Mwomboi and here by signed below in agreement.*

*ONESMUS MUTHAMI MWOMBOI*

Sign: signed

Date: 18/01/2016 thumbprint

Witnessed by: \_\_\_\_\_”

47. MR. ELISHA OKINDA signed a similar agreement on 13<sup>th</sup> December 2016.

48. For unexplained reason, the Claimants made no reference to these two agreements in their testimony but did not fault them in any way nor were the copies of payment receipts to Onesmus Mwomboi of Kshs.71,600/- receipt serial no. 047923 dated 3<sup>rd</sup> January 2016, 12 days after signing the settlement agreement.

49. Mr. Elisha Okinda received four payments as follows:

- i) Receipt no. 56417 dated 15.12.2016 for Kshs.7,200
- ii) Receipt no. 56418 dated 15.12.2016 for Kshs.31,200
- iii) Receipt no. 56419 dated 15.12.2016 for Kshs.62,400
- iv) Receipt no. 56420 dated 15.12.2016 for Kshs.72,000

**Total Kshs.172,800**

50. Both Mr. Onesmus Mwomboi and Elisha Okinda signed and thumb printed the discharge agreements and did not contest them at the hearing and signature meant that they had read and understood the contents of the agreements.

51. In **Krystalline Salt Ltd v Kavekere Mwakele & 67 Others [2017] eKLR** the Court of Appeal **stated** that:

*“We would agree with the trial Court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however as far as we are prepared to go. The Court has, in each and every case to make a determination if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all irrelevant information and knowledge.”*

52. The Court is in agreement with and is bound by these sentiments. Relatedly, in **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR** the Court of Appeal stated that:

*“The execution of the discharge voucher, we agree with the learned Judge, constituted a complete contract: Every payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud, or other. The appellant was fully discharged.”*

53. The Court is bound by these sentiments.

54. I now proceed to apply the above principles to the instant case. Regrettably, CW1 was unaware of the discharge vouchers or settlement agreements entered into by his colleagues and could not therefore fault them since he had no evidence.

55. By the agreements on record, both Onesmus Mwomboi and Elisha Okinda waived their rights to lodge or pursue further claims against the Respondent. They not only signed the agreement but additionally thumb printed it to confirm their identity.

56. There is no evidence of fraud, misrepresentation or other vitiating element of the settlement agreement.

57. The Court is satisfied that both Onesmus Muthami Mwomboi and Elisha Okinda discharged the Respondent from further liability consensually and were bound by the agreement and had no further claims against the Respondent. Their claims are dismissed.

58. The Respondent's witness testified that the 1<sup>st</sup> Claimant was paid. If indeed he was paid for the notice period, no payment is due, but he is entitled to the equivalent of two months' salary.

59. In conclusion, judgment is entered for the 1<sup>st</sup> and 2<sup>nd</sup> Claimant as follows:

**(a) The equivalent of one (1) month's salary in lieu of notice.**

**(b) The equivalent of 2 months' salary for the 1<sup>st</sup> and 2<sup>nd</sup> Claimant.**

**(c) All other claims are dismissed.**

**(d) The Claimant is awarded 50% of the costs.**

**(e) Interest from the date of judgment till payment in full.**

60. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF MARCH 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**