



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 87 OF 2017

BETWEEN

1. EDWIN OCHAR
2. DANCAN KENNEDY ONYANGO OWAKA
3. FREDRICK KENNEDY OUMA
4. AMBROSE KITHAKA MWASYA.....CLAIMANTS

VERSUS

1. HABO GROUP OF COMPANIES
2. AWANAD ENTERPRISES LIMITED.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. Advocates for the Claimants

Bosire & Partners, Advocates for the Respondent

JUDGMENT

1. The Claimants filed their Statement of Claim on 2nd February 2017. They state that they were employed by the 1st Respondent on different dates, in years 2012, 2013 and 2014. They worked as Port Clerks. They were paid by the 1st Respondent. Their contracts were terminated by the 1st Respondent, in August 2016.

2. They state, termination was without notice. There was no letter to show cause why they should not be summarily dismissed. The 1st and 2nd Claimant's salary was Kshs. 32,000 per month as of the date of termination. The 3rd and 4th Claimants earned Kshs. 15,000 monthly.

3. They pray for Judgment against the Respondents in the following terms: -

1ST CLAIMANT, OCHAR.

- a. Severance pay.... Kshs. 64,000.
- b. Notice pay Kshs. 32,000.
- c. Salary arrears.... Kshs. 170,000.
- d. Annual leave...Kshs. 64,000.

- e. Deducted /un-remitted Sacco dues ... Kshs. 14,400.
- f. Deducted/un-remitted N.H.I.F dues... Kshs. 23,160.
- g. Deducted/un-remitted N.S.S.F dues... Kshs. 10,000.
- h. Compensation for unfair termination... Kshs. 384,000.
- i. Unpaid salary for August 2016 ... Kshs. 32,000.
- j. Leave / transport allowance at Kshs. 9,000.

Total... Kshs. 802,560.

2ND CLAIMANT, OWAKA.

[same figures as the 1st Claimant above]

3RD CLAIMANT, OUMA.

- a. Severance pay...Kshs. 15,000.
- b. Notice pay...Kshs. 15,000.
- c. Salary arrears...Kshs. 10,000.
- d. Annual leave...Kshs. 30,000.
- e. Deducted/un-remitted Sacco dues...Kshs. 12,200.
- f. Deducted/ un-remitted N.H.I.F dues...Kshs. 7,200.
- g. Deducted/ un-remitted N.S.S.F dues... Kshs. 4,800.
- h. Compensation for unfair termination...Kshs. 180,000.
- i. Unpaid salary for August 2016...Kshs. 30,000.
- j. Leave/ transport allowance...Kshs. 9,000.

Total... Kshs. 313,200.

4TH CLAIMANT, MWASYA.

- a. Severance pay...Kshs. 22,500.
- b. Notice pay...Kshs. 15,000.
- c. Salary arrears...Kshs. 32,000.
- d. Annual leave...Kshs. 45,000.
- e. Deducted/ un-remitted Sacco dues...Kshs. 11,100.
- f. Deducted/ un-remitted N.H.I.F dues...Kshs. 20,500.
- g. Deducted/un-remitted N.S.S.F dues...Kshs. 8,200.
- h. Compensation for unfair termination...Kshs. 180,000.
- i. Unpaid salary for August 2016...Kshs. 30,000.
- j. Leave/transport allowance...Kshs. 9,000.

4. In total, the Claimants claim an amount of Kshs. 2,291,620; declaration that termination was unfair; costs; and interest.
5. The Co-Claimants gave written authority to the 1st Claimant, filed on 4th October 2019, to prosecute the Claim.
6. The Respondents filed their Statement of Response on 28th August 2017. Their position is that they did not employ the Claimants. The Claimants were employed by different entities. They ought to have sued their respective Employers. Their documents on record confirm that they held meetings, with their respective Employers, where they were informed of discontinuation of their employment, on account of redundancy. They were accorded fair hearing. The process was carried out fairly and lawfully. The Claim is frivolous and ought to be dismissed with costs.
7. Ochar gave evidence and rested Claimants' case, on 11th November 2019. Respondents' Administrator Anderson Mugambi, gave evidence for the Respondents, closing the hearing on 11th March 2020. The matter seems to have hibernated over covid-19 concerns until 20th January 2021 when it was last mentioned in Court. Parties confirmed filing and service of their Closing Submissions, and the file was forwarded to the Trial Judge sitting at Nairobi, for preparation of the Judgment.
8. Ochar adopted his Witness Statement and Documents filed by the Claimants, in his evidence. Some of the Claimants had letters of employment issued by Habo Group. Termination letters were issued in the name of Habo Group. The Respondents justified termination on redundancy. They undertook to pay the Claimants their terminal benefits. Nothing was paid. Habo Group is the umbrella Employer. It was to pay terminal dues. Nothing was paid. Cross-examined, Ochar told the Court, all Claimants worked as Port Clerks. They were given reason for termination. They were advised that business was low.
9. Mugambi conceded that the Claimants were employed by the Respondents as Port Clerks. The Respondents had financial challenges in 2016. They consulted staff and informed them, that they were going through a rough patch. The Respondents notified Labour Office of intended redundancy. Upon clearance, the Respondents paid Claimants' dues. Cross-examined, Mugambi told the Court there was no dispute on the Claimants' employment. They left employment on redundancy. Mugambi did not have minutes of meetings held between the Parties, prior to termination. He did not have evidence of payments made to the Claimants. He was aware payments should have been made before the Claimants left. N.H.I.F and N.S.S.F obligations were met. Mugambi did not have documents showing this. Clearance forms show nothing was owed by way of annual leave. He did not see signatures from the Claimants on the clearance forms. Redirected, Mugambi told the Court that the Claimants did not demand leave dues on clearance.

The Court Finds: -

10. There is no dispute, going by the evidence given by the Respondents, that the Claimants were employed by the Respondents as Port Clerks. The pleading by the Respondents, that the Claimants were, Employees of different entities, and therefore should have directed their respective Claims at those entities, is corrected in the evidence of Administrator Mugambi. The letters of employment, termination, pay reviews and pay slips on record, show beyond doubt, that the 2nd Respondent is a unit within the Habo Group of Companies. This Court has dealt with a sizeable number of other matters in the past, relating to the Respondents and other sister companies, where this finding of fact has concretized. There is no dispute on the presence of employer-employee relationship.
11. The Claimants were, Port Clerks. The Respondents are involved in among other businesses, cargo handling. The Claimants' respective salary rates, at the time of termination, are not in dispute. It is not disputed that the Claimants' contracts were terminated through a letter issued by the 1st Respondent, dated 24th August 2016.
12. The letter refers to economic forces beyond the control of the Respondents, which compelled the Respondents to make difficult decisions. To survive in this market, the letter states, *"the company will be undergoing re-organization and streamlining process. It is with great regret that we inform you that your employment at Habo Group of Companies is terminated effective from 1st September 2016, This layoff is due to low business and company restructuring. Your file shall be retained and you may be recalled back [sic] when the situation improves. We will provide you with the appropriate amount of termination pay, based on your time with the Company as per the Employment Act 2007, your employment letter and Labour Standards. You are advised to proceed and clear with the relevant departments to facilitate payment of your final dues."*
13. The reason justifying termination as can be seen above, was redundancy, calling on the Respondents, to proceed under Section 40 of the Employment Act. Did they?
14. Other than the letter of termination, there is no other documents issued by the Respondent, pursuant to the alleged redundancy. There was no notice of intended redundancy under Section 40[1] [b]. There was no notice of intended redundancy, issued to the Labour Office under this provision. The selection criterion was not articulated under Section 40 [1] [c]. No notice of termination was issued, or paid under Section 40 [1] [f]. There was no severance pay made, under Section 40[1] [g]. There was no meaningful consultation involving the Claimants, Respondents and the Labour Office. Termination was at the will of the Respondents.
15. There was not the slightest effort to comply with the minimum statutory standards of fair and lawful redundancy, as prescribed under Section 40. The Respondents did not even establish that there indeed was, a redundancy situation. No financial statements were availed to the Court, or to the Claimants, showing the presence of *"economic forces beyond our control."*
16. Termination was unfair and not based on valid reason or procedure. The Claimants merit compensation for unfair termination.
17. They were not able to establish through evidence, their prayers for refund of Sacco dues. The prayer for salary arrears was not specific.

They pray for salary for August 2016, and make a separate prayer for arrears of salary, over unspecified period. They did not establish their prayers for refund of N.H.I.F and N.S.S.F dues. If there were such deductions made and not remitted, it is open to the Claimants to pursue remedy with the respective statutory bodies, under their constitutive laws. The prayers for annual leave, state amounts claimed, but not the period of annual leave under reference. Leave and transport allowances are given monetary value, but again the Claimants fail to specify the items are based on which period. Their contracts do not have clauses on leave and transport allowance. These items are declined.

18. The Court is satisfied that the Claimants merit a declaration that termination was unfair; severance pay; notice; and compensation for unfair termination.

19. They merit costs and interest. The Respondents undertook payment of terminal dues at the time of termination, but nothing was paid. Section 40 contemplates that termination on redundancy is only valid, when the Employer has fulfilled its obligations under Section 40. Redundancy payments cannot validly be made through a promissory note.

20. The 1st and 2nd Claimants were employed in 2012; the 3rd Claimant in 2014; and the 4th Claimant in 2013. Their contracts were term-indefinite. It can fairly be presumed, that they expected to go on working until retired. Termination was not at their instigation or fault. There were no complaints against them from the Respondents, with regard to performance or discipline. They enjoyed unblemished records.

21. *The 1st and 2nd Claimants are granted compensation for unfair termination equivalent to their 4 months' gross salary at Kshs. 128,000 each.*

22. *The 3rd Claimant is granted equivalent of 2 months' gross salary in compensation for unfair termination at Kshs. 30,000.*

23. *The 4th Claimant is granted equivalent of 3 months' gross salary in compensation for unfair termination at Kshs. 45,000.*

24. *All Claimants are allowed the prayer for 1- month salary in lieu of notice, at Kshs. 32,000 for the 1st and 2nd Claimants, and Kshs. 15,000 for the other 2 Claimants.*

25. The Claimants' contracts of employment adopt the minimum statutory rate of severance pay, at 15 days' salary for every complete year of service. *They are granted 15 days' salary for each complete year of service, translating to Kshs. 64,000 for 1st and 2nd Claimants; Kshs. 15,000 for the 3rd Claimant; and Kshs. 22,500 for the 4th Claimant.*

26. *Costs to the Claimants.*

27. *Interest granted at the rate of 16% per annum from the date of termination, 1st September 2016, till payment in full.*

IN SUM, IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondents shall pay-

1st Claimant: compensation, Kshs. 128,000; notice, Kshs. 32,000; and severance, Kshs. 64,000 – total Kshs. 224,000.

2nd Claimant: Kshs. 224,000 made up as in 1st Claimant's above.

3rd Claimant: compensation, Kshs. 30,000; notice, Kshs. 15,000; and severance, Kshs. 15,000 – total Kshs. 60,000.

4th Claimant: compensation, Kshs. 45,000; notice, Kshs. 15,000; and severance, Kshs. 22,500- total Kshs. 82,500.

c. Costs to the Claimants.

d. Interest granted at the rate of 16% per annum from the date of termination, 1st September 2016, till payment in full.

DATED, SIGNED AND DELIVERED ELECTRONICALLY, UNDER COVID-19 MINISTRY OF HEALTH AND JUDICIARY GUIDELINES, AT NAIROBI, THIS 12TH DAY OF MARCH 2021

JAMES RIKA

JUDGE