



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 425 OF 2018

HAMISI KATANA NGOWA.....1ST CLAIMANT

STEPHEN NDEGWA KADENGE.....2ND CLAIMANT

ALEX FOSI NYALE.....3RD CLAIMANT

- VERSUS -

KALUWORKS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 13th May, 2021)

JUDGMENT

The claimants filed the memorandum of claim on 19.06.2018 through M/S Otieno Asewe & Company Advocates. Their alleged case is as follows:

- a) The respondent employed the 1st claimant as a packing helper sometimes in 2011 and was declared redundant on 16.02.2018 at a time his monthly pay was Kshs.8, 164.00 He had worked for 7 years.
- b) The 2nd claimant was employed in 2012 as a machine operator and declared redundant on 17.02.2018 at a time he earned Kshs.9, 870.00 per month. He had worked for 6 years.
- c) The 3rd claimant was employed in 2002 as a machine operator and declared redundant on 06.11.2017 at a time his monthly pay was Kshs.12, 707.00
- d) On diverse dates from 06.11.2017 to 16.02.2018 each received a termination letter on account of redundancy due to reduced production capacity in the respondent's plant. It is their case they were not given a notice or informed about the method used to declare each redundant. In particular
 - i. No notices were served per section 40(1) (a) and (f) of Employment Act, 2007.
 - ii. Selection criteria adopted to declare them redundant as to seniority in time, skill, ability and reliability of the claimants was disclosed as per section 40 (1) (d) (e) (f) and (g) of the Act.
 - iii. There was no genuine reason to declare the claimants redundant.
- e) The termination was unfair because the statutory due procedure was not followed and they were not paid terminal and contractual dues.

The 1st claimant claimed and prayed for:

- a) One-month notice payment Kshs. 12, 926.55.
- b) Underpayment 2013- February 2018 Kshs.148, 754.80.
- c) Severance pay from 2004 – 2007 15days x Kshs,497 x 7 years Kshs.52, 185.00.

d) Compensation for unfair termination on account of redundancy 12, 926 x 12 Kshs. 155, 118.60.

e) Total Kshs.368, 984.95.

The 2nd claimant claimed and prayed for:

a) One-month pay in lieu of notice Kshs.17, 447.15.

b) Underpayment from May 2013 to February 2018 Kshs.371, 809.50.

c) Severance pay from 2005 -2016 15days x 671 x 6 years Kshs.60, 390.00.

d) Compensation for unfair termination 17, 447.15 x 12months Kshs.209, 365.80.

e) Total Kshs.659, 011.65.

The 3rd claimant claimed and prayed for:

a) One-month pay in lieu of notice Kshs.17, 447.15.

b) Underpayment from May 2013 to November 2017 Kshs.329, 140.35.

c) Severance pay from 2005 to 2016 15days x671x15 Kshs.150, 975.00.

d) Compensation for unfair termination on account of redundancy Kshs. 17, 447.15 x 12 months Kshs.209, 365.80.

e) Total Kshs.706, 928.30

The sum prayed for the claimants was therefore Kshs.1, 734, 924.90.

The claimant jointly prayed for judgment against the respondent for:

a) The respondent to pay the claimants a sum of Kshs. 1, 734, 924.90.

b) A declaration that termination of the claimant's employment was unfair, unjust and wrongful.

c) Costs of the claim plus interest thereon at Court rates.

d) Any other relief that the Honourable Court may deem just and fit to grant.

The respondent filed the memorandum of response on 31.07.2018 through Anne Wamithi & Company Advocates. The respondent's case is as follows:

a) The respondent admits that it employed the 1st claimant as a packer in the Assembly – PKW Department but for a term of six months from 11.10.2017 at a consolidated monthly pay of Kshs. 9, 144.00 inclusive house allowance.

b) The respondent employed the 2nd claimant as a Machine Attendant in the Assembly – PKW Department for a term of six months from 30.11.2017 at a consolidated monthly salary of Kshs.9, 870.00 inclusive of house allowance.

c) The respondent employed the 3rd claimant as a Circle Cutting Attendant in the Flatmill Department for a term of six months from 17.10.2017 at a consolidated monthly salary of Kshs.12, 707.00 inclusive of house allowance.

d) The respondent at material time experienced operational work challenges which resulted in reduced production capacity so that its programme was disrupted.

e) According to clause 7 of the claimants' contracts of employment the continuity of each of the claimant's employment was subject to anticipation of work operational programmes running as planned and any unforeseen interruption to such programmes would have corresponding interruption on the contracts which would be deemed to terminate automatically without notice. Clause 8 of the contracts provided that either party could terminate the employment contract by giving one-month written notice or paying one month's salary in lieu of such notice. The claimants' contracts of service were terminated in line with the provisions of the employment contracts which allowed either party to terminate the employment contracts by issuing a one-month notice or effecting payment of one month's salary in lieu of such notice. The claimants met the respondent's human resource manager one Emma Maina who extensively explained to them that their contracts were being terminated per clauses 7 and 8 thereof. Each claimant accepted and acknowledged the termination and terms of the termination by signing a copy of the termination notice and the notices were sent to the labour officer, two dated 16.02.2018 and one dated 06.11.2017 signed by each claimant respectively. The terminal

dues were computed and explained to each claimant and each understood the same properly and signed in acceptance and acknowledgement.

f) The final terminal dues were paid as agreed between the parties. The 1st and 2nd claimants acknowledged receipt of their respective dues on 19.02.2018 and signed clearance forms acknowledging that they held no further claims against the respondent. The 3rd claimant was similarly paid final dues at his bank account and final payslips were issued.

g) The allegations and claims of unfair redundancy are misconceived and denied. The labour officer was notified about the claimants' termination per section 78 of the Employment Act, 2007.

h) The contracts of service were terminated in terms of clauses 7 and 8 and per section 36 of the Employment Act, 2007.

i) No notice to sue was served and the respondent is entitled to costs of the suit. The claims and prayers should be declined. The claimants were paid per the terms of the respective contracts of service. The 1st and 2nd claimants have refused to collect their contracts of service which were drawn and are ready per section 51 of the Act.

j) The one-month salary in lieu of notice was paid per exhibits filed.

k) The alleged underpayment is denied as unjustified and time barred per section 90 of Employment Act, 2009.

l) Any pending leave days were paid per section 28 (1) (b) of the Act.

m) By reason of section 35(6) (d) of the Act, the service pay is not due as claimed because the claimants were members of the NSSF.

n) Severance pay is not due as the termination was not on account of redundancy.

o) Section 36 of the Act entitled the respondent to terminate the contracts of service without notice and paying one-month salary in lieu of such notice.

The respondent prayed for judgment against the claimants for:

a) Dismissal of the suit.

b) Costs of the suit.

c) Interest on costs at Court rates.

d) Such other or further relief as the Court deems just and fit to grant.

The claimants' witness No.1 (CW1) was the 3rd claimant and the witness No. 2 (CW2) was the 1st claimant. The 2nd claimant did not testify. The respondent's witness (RW) was Hezrone Rachilo. The Court has considered the pleadings, the evidence and final submissions on record. The Court makes findings as follows:

1) The evidence is that as at termination each claimant was serving on a term contract of 6 months as pleaded and submitted for the respondent and as per the exhibited respective contracts.

2) The evidence is that the fixed term contracts were terminated in accordance with clauses 6, 7 and 8 thereof. Clause 6 stated that the duration of the contract was envisaged to be 6 months. Clause 7 stated that the duration set in clause 6 was in anticipation of work operational programmes running as planned and further, **"... However, should there be any unforeseen interruption to such programmes; such interruption shall have corresponding interruption on the Contract which shall accordingly be deemed to have automatically terminated itself without notice."** Clause 8 stated that either party may terminate the contract by giving the other one month's notice or equivalent pay in lieu thereof and without prejudice to the respondent to terminate the contract summarily for any lawful cause. CW2 testified that he understood the terms of the contract of employment and at termination, the human resource manager one Emma summoned him and gave him the termination letter. CW2 further testified thus, **".... As at termination there were 2 months to end of contract. At termination production had gone low. So it is true work had reduced."** Similarly, RW testified that the contracts were terminated per clauses 7 and 8 due to unforeseen interruption of business by giving one-month notice. Further, in the present case there was reduced production capacity. The Court returns that by that evidence for the parties, the contracts were terminated per contractual clauses 7 and 8 and the respondent was entitled to terminate accordingly. As submitted for the respondent, per section 36 of the Act, the respondent was entitled to terminate by paying one-month salary in lieu of the termination notice. The exhibits show that claimants were duly paid as pleaded for the respondent and they acknowledged the payment including one-month pay in lieu of the termination notice.

3) The Court finds that the contracts having been clearly terminated in accordance with clauses 7 and 8, the allegations of unfair redundancy and the related claims of severance pay under section 40 of the Act and compensation for unfair termination under section 49 of the Act were misconceived and unjustified as per the respondent's pleadings and submissions.

4) As pleaded and submitted for the respondent the claimants have not established the basis for the claims for underpayment and the evidence is that the respondent paid the claimants all the agreed salaries. It is trite law that special damages like the claimed underpayment is pleaded

and strictly proved. The Court has reconsidered the memorandum of claim and it is clear that the claimants have not pleaded the basis or foundation of the underpayments and details on how the computations therein were arrived at. The claims and prayers for underpayment will fail.

5) The respondent filed submissions belatedly and each party will bear own costs of the suit.

In conclusion the claimants' suit is hereby dismissed with orders each party to bear own costs of the proceedings.

Signed, dated and delivered by video-link and in court at Mombasa this Thursday 13th May, 2021.

BYRAM ONGAYA

JUDGE