



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1274 OF 2016

HOSEA FABIANS OKOTH.....1ST CLAIMANT

WYCLIFFE LUSANGARI.....2ND CLAIMANT

WYCLIFFE LIWALI.....3RD CLAIMANT

EMMANUEL OMONDI.....4TH CLAIMANT

VERSUS

EXECUTIVE SUPER RIDES LIMITED.....RESPONDENT

JUDGMENT

1. The 4 Claimants instituted this claim vide a Memorandum of Claim filed on 29th June 2016 against Executive Super Rides Limited for the unfair and wrongful termination of their employment. They aver that they were employed by the Respondent on diverse dates being 1st November 2015, 1st December 2014, 22nd September 2013 and 16th June 2015 respectively. They aver that the 1st, 2nd and 4th Claimants were earning a monthly salary of Kshs. 18,000/- while the 3rd Claimant earned Kshs. 23,000/-. The Claimants further aver that on 1st April 2016 the Respondent terminated their employment without notice. The Claimants aver that the Respondent did not pay their terminal dues and that it did not have a fair reason to terminate their employment. The Claimants thus seek one month's salary as notice pay, unpaid leave, unpaid public holidays, unpaid house allowance, damages for wrongful termination and issuance of their Certificates of Service. The Claimants pray for judgment against the Respondent for an order that their termination by the Respondent was unfair and wrongful. They seek payment of their dues as particularised in the Memorandum of Claim together with interest at court rates from the date of filing suit until payment in full; costs of the suit together with interest at court rates; and such other relief as this Court deems fit. The 1st Claimant filed a witness statement on 13th July 2021 on his behalf and on behalf of his 3 Co-Claimants. He states that they are aggrieved because the abrupt nature of their dismissal was inhumane and their families and personal obligations had developed reliance upon the said employment. That the said summary dismissal was unlawful, unfair, discriminatory, unjustified and illegal because:

- 1) No notice to show cause laying down the grounds and/or charges preferred against the Claimants and requiring them to answer to the same was issued.
- 2) No disciplinary hearing of any kind was undertaken by the Respondent before the decision to dismiss was reached.
- 3) No letter(s) of dismissal detaining reasons or offence found and proved against the Claimants was issued.
- 4) The Respondent failed to observe the basic tenets of natural justice before its decision to dismiss the Claimants from employment.

The Claimants thus sought various reliefs set out in the memorandum of claim, to wit, one month's salary notice, unpaid leave, unpaid public holidays, unpaid house allowance and damages for wrongful termination. The claims for each totalled to Kshs. 253,906.80 for 1st Claimant; Kshs. 278,790/- for 2nd Claimant; Kshs. 310,820.46 for the 3rd Claimant; and Kshs. 495,301.84 for the 4th Claimant. They also sought costs of the suit as well as interest at court rates.

2. The Respondent filed its Memorandum dated 22nd December 2016 admitting that it employed the Claimants on diverse dates as Cleaners. It avers that on or about the month of March 2016, it entered into a contract for services with Infinity Trading Company Limited to supply manpower services to the Respondent upon payment of its professional fees in relation to cleaning services at the Respondent's premises. The Respondent averred that the Claimants were informed of the transition to Infinity Trading Company Limited and further assured of

similar terms and conditions of employment without interruption as though they had not stopped their employment relationship. The Respondent averred that consultations then took place over a number of days before a decision was made to introduce a change in working conditions on March 2016 and the Claimants were now answerable to Infinity Trading Company Limited and not the Respondent. The Respondent avers that the Claimant voluntarily absconded duties and consequently terminated their employment without giving one month written notice and that they are therefore not entitled to notice pay. The Respondent averred that the claims for pending salary and unpaid holiday dues by the Claimants are unfounded and meant to extort it while the claim for unpaid house allowance is unjustified as the Claimants earned salaries that were all inclusive. The Respondent averred that the 3rd and 4th Claimants are not entitled to service pay since they were members of the NSSF whose monthly contributions the Respondent diligently remitted to the NSSF. The Respondent averred that the Claimants used to be paid wages way above the minimum standards established for Cleaners and were also enjoying annual performance bonuses. The Respondent further averred that the Claimants absconded duties and their services became summarily terminated by operation of law on 11th May 2016 when they demanded payment of their terminal dues and evinced their intention not to return to the Respondent. The Respondent averred that the Claimants later filed a complaint at the County Labour Offices but later withdrew their complaint. The Respondent averred that the Claimants' positions still existed and they were expected to continue serving the Respondent in the same role and that there was thus no justification for them to leave on the basis that their positions had become redundant. The Respondent avers that the concept of outsourcing labour is a practice recognised in modern democratic economies and that the Claimants have not in any way demonstrated a case of termination of employment. It prays that for the foregoing reasons, the dispute herein be dismissed with costs to the Respondent.

3. The Claimants testified through their representative the 1st Claimant. He produced his statement and relied on it as his evidence in chief and further produced the Authority to Plead and the Claimants' Bundle of documents. He testified that they used to clean motor vehicles and that they were called for a meeting on 29th March 2016 by the Director and told they would no longer be employees come first of April, without being given any reason. He asserted that they were not allowed to proceed on leave and that they worked on public holidays. He stated that there was also no house allowance. In cross-examination he stated that apart from the 4 Claimants, no other person was present in the meeting held on 29th March and denied they were informed of any terms. He questioned how they were expected to report to a company they had not contracted with. In re-examination he asserted that they were not part and parcel of the agreement and neither were they given any communication and that they are in Court because they did not get any relief at labour offices. The Respondent on their part relied on their filed documents before Court.

4. The Claimants submit that Section 43 of the Employment Act provides that an employer shall prove the reasons for termination but no proof was availed to them and/or before this Court by the Respondent to substantiate its reasons for termination. The Claimants submit that the Respondent failed to call any witness to Court to rebut the same and that it is now a settled principle that where no witness is called on behalf of the defence, the evidence tendered on behalf of the claimant remains uncontroverted. They relied on the authority of **Stanley Mwangi Gachungu & Another v Barclays Bank of Kenya Ltd [2019] eKLR** as well as the case of **Donald Odeke v Fidelity Security Ltd [2011] eKLR** where Ndolo J. observed that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is *ipso facto* unfair. They further submit that they are entitled to the claim for notice under Section 36 as read together with 35 of the Employment Act and that since the Respondent did not adduce any evidence controverting the Claimants' claim for leave and public holidays, they are entitled to the same under Section 28 of the Employment Act. The Claimants submit that having found the Respondents failed to pay NSSF for the duo, the claim for service pay for the 3rd and 4th Claimants remains payable by virtue of Section 35(5) of the Employment Act and since the Respondent failed to produce any documentary evidence to counter their claim for unpaid house allowance as required by Sections 10 and 74 of the Employment Act, they are entitled to the same. The Claimants also submit that they are entitled to 12 months' salary award in damages for the unfair and unlawful dismissal by the Respondent as stipulated under Section 49 of the Employment Act. They cited the case of **Paul Ngeno v Pyrethrum Board of Kenya [2013] eKLR** where the Court awarded the claimant 12 months' salary compensation because of the unlawful and unfair manner his employment was terminated. The Respondent did not file any Submissions.

5. The concept of outsourcing is not new. However, for outsourcing or to be of legal effect the same has to involve the affected employees in any outsourcing agreement to give their individual consent. In this case the Respondent did not indicate the terms of the outsourcing and did not exhibit the consent of staff to the said outsourcing to Infinity Trading Company Limited. Further, in the case of **Wrigley Company (East Africa) Limited v Attorney General & 2 Others & Another [2013] eKLR** the Court held that the parameters for a credible outsourcing program were *inter alia*:

- a) Ordinarily, employers are not expected to outsource their core functions;
- b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
- c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
- d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

6. The Claimants were not subjected to the treatment required in a contract for outsourcing services. The Claimants were therefore unfairly terminated by the Respondent when it purported to transfer their services to Infinity Trading Company Limited. The Claimants sought various relief including reliefs that were time barred and some that were not sufficiently proved as no requests for leave that was denied were attached, there was no evidence of work on public holidays, unpaid house allowance or in the case of some of them service pay. The Claimants are therefore entitled to recover from the Respondent the following as I enter judgment for the Claimants against the Respondent for:-

- 1) 1st Claimant – Hosea Fabians Okoth

- a. One month's salary in lieu of notice – Kshs. 18,000/-
- b. Service pay – Kshs. 2,700/-
- c. Compensation for unlawful dismissal equivalent to 3 month's salary – Kshs. 54,000/-

Total Kshs. 74,700/-

2) 2nd Claimant – Emmanuel Omondi

- a. One month's salary in lieu of notice – Kshs. 18,000/-
- b. Service pay – Kshs. 2,700/-
- c. Compensation for unlawful dismissal equivalent to 3 month's salary – Kshs. 54,000/-

Total Kshs. 74,700/-

3) 3rd Claimant – Wycliffe Lusangari

- a. One month's salary in lieu of notice – Kshs. 18,000/-
- b. Compensation for unlawful dismissal equivalent to 3 month's salary – Kshs. 54,000/-

Total Kshs. 72,000/-

4) 4th Claimant – Wycliffe Liwali

- a. One month's salary in lieu of notice – Kshs. 23,000/-
- b. Compensation for unlawful dismissal equivalent to 3 month's salary – Kshs. 69,000/-

Total Kshs. 92,000/-

- 5) Interest at Court rates on the sums in 1), 2), 3) and 4) above from the date of judgment till payment in full.
- 6) Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE