



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 84 OF 2018

VINCENT JUMA MTSUMI.....1ST CLAIMANT

BERNARD OTIENO ODIE.....2ND CLAIMANT

ALEX NDEMO OYARO.....3RD CLAIMANT

VERSUS

ASSOCIATED ELECTRICAL & HARDWARE SUPPLIES LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th October, 2021)

JUDGMENT

The claimants filed the memorandum of claim on 01.03.2018 through Abondo Angáwa Advocate of Kituo Cha Sheria. The claimants were employed by the respondent on diverse dates. They allege that on 15.07.2017 they were terminated without any justifiable reason and they were not paid their terminal dues. They allege the procedure in terminating them was in breach of the Employment Act, 2007. They claim terminal dues including leave due not taken or paid; pay in lieu of termination notice; and compensation for unfair, wrongful and unlawful termination. They pray for judgment against the respondent for:

- 1) A declaration that the termination of the claimants' employment was unfair and unlawful.
- 2) Payment to Vincent Juma Mtsumi notice pay Kshs.19, 840.00, leave pay for 2 years Kshs.39, 680.00, compensation Kshs. 238, 080.00, and total Kshs.297, 600.00; to Bernard Otieno Odie notice pay Kshs. 10, 080.00, leave pay for 3 years Kshs.30, 240.00, compensation Kshs.120, 960.00, and total Kshs.161, 280.00; and to Alex Ndemo Oyaro notice pay Kshs.15, 000.00, leave pay for 4 years Kshs. 30,000.00, compensation Kshs. 238, 080.00, and compensation Kshs.343, 080.00.
- 3) The respondent to issue a certificate of service to the claimants.
- 4) Any other relief the Honourable Court may deem fit and just to grant to meet the ends of justice.
- 5) Costs of the suit.

The claimants pleaded that their respective monthly pay as at termination was Kshs.19, 840.00; Kshs.10, 080.00; and Kshs.15, 000.00.

The respondent filed the statement of defence on 04.04.2018 through E.N. Waithera & Company Advocates, changed Advocates to George Egunza & Associates on 03.07.2019, and further changed Advocates to Mwakireti & Asige Advocates on 06.10.2020. The respondent denied to have terminated the services of the claimants and stated that the claimants deserted their duties and thereafter resurfaced to claim their dues. Further the dues were already paid and the claimants' claims are unfounded. The respondent denied terminating the claimants and without reason as alleged by the claimants. The respondent further pleaded that the claimants were involved in theft by servant and which criminal matter is still pending under investigation. The respondent prayed that the claimants' claim be dismissed with costs.

On 15.06.2021 the Court ordered, by consent of the parties, the suit be determined on the basis of the pleadings and documents (then admitted in evidence) and final submissions. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows:

- 1) The pleadings and the material on record show that parties were in a contract of service.

2) The respondent denies ever terminating the claimants and states that the claimants deserted duty. The claimants alleged that they were terminated without notice. The parties did not exhibit documents to aid the court to resolve the dispute and to establish the exact circumstances of the separation. The Court has considered the submissions made for parties in reliance upon their respective witness statements on record but finds that without examination and cross-examination of the witnesses to test and establish the truthfulness of the matters in the witness statements, there is no evidence on record for the Court to make a finding one way or the other.

3) In view that the issue of whether a termination took place and the surrounding circumstances having not been established, the Court will not delve into the issue of fairness, wrongfulness and unlawfulness of the alleged termination or dismissal.

4) The respondent has submitted and agreed to pay the 1st claimant Kshs. 31, 744.00 for 48 leave days and for 2nd claimant Kshs. 7, 728.00 for 23 leave days. They are awarded accordingly. The 3rd claimant offered no evidence and particulars of his alleged pending leave days and the respondent having alleged he was a casual employee with no leave days, the Court will not award him at all.

5) In view of parties' margins of success and awards solely based on respondent's admissions, each party to bear own costs of the suit.

In conclusion the suit is determined with orders:

1) The respondent to pay the 1st claimant **Kshs. 31, 744.00** and the 2nd claimant **Kshs. 7, 728.00** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.

2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH OCTOBER, 2021.

BYRAM ONGAYA

JUDGE