



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE 452 OF 2016

PAUL OCHESO OTENGO.....1ST CLAIMANT
HEZRON NMBANGO KHAKALI.....2ND CLAIMANT
MORRIS LUGADO KANILI.....3RD CLAIMANT
DAVID MAHERO MUKAISI.....4TH CLAIMANT
DAVID ATEKA GARDI..... 5TH CLAIMANT
ROBERT KIPYEGON BETT.....6TH CLAIMANT
KEVIN ODHIAMBO OCHIENG.....7TH CLAIMANT
NICHOLAS KIPKOECH BETT.....8TH CLAIMANT
STANLEY WANYOIKE KAMAU.....9TH CLAIMANT
FREDRICK O.WALUANGA.....10TH CLAIMANT

-VERSUS-

GIRISH KUMAR PATEL T/A TEJ DIP HARDWARE STORES.....RESPONDENT

JUDGMENT

1. The Claimants herein filed a Memorandum of Claim dated 9th November, 2016 on even date through the firm of M. Korongo and company Advocates seeking for orders that each of the claimants be paid the following; -

- 1. One month gross wages in lieu of notice**
- 2. Underpayments**
- 3. Normal overtime**
- 4. Off duties**
- 5. Public holidays**
- 6. Leave**
- 7. Gratuity**

8. Compensation based on section 49(1)(c) of the Employment Act.

2. The 1st claimant was employed on 2.12.2013, The 2nd claimant on 24.11.2011, the 3rd claimant on 23.5.2015, the 4th claimant on 12.9.2013, the 5th claimant on 17.2.2016, the 6th claimant on 8.9.2015, the 7th claimant on 26.6.2015, the 8th claimant on the 1.6.2015 the 9th claimant in December 2009 and the 10th claimant in April, 2013.
3. The 1st, 2nd, 3rd, 4th and 5th Claimants were employed as drivers, the 6th, 8th and 9th claimants were employed as turn boys while the 7th and 10th claimants were employed as mechanics.
4. At the time of termination, all the drivers were each paid a monthly gross salary of Kshs. 15,000 save for the 3rd Claimant who was paid a salary of Kshs. 10,000. The 6th and 7th claimant were each Paid Kshs. 9,000, the 8th claimant was paid Kshs. 6,000 while the 9th and 10th claimants were each paid Kshs. 15,000 per month.
5. The claimants aver that they reported to work each day at 6:30 am till 6:30 pm all days of the week without any rest day as provided for under section 27(2) of the Employment Act. Also that they were never paid overtime for the extra hours worked.
6. They stated that they all worked during public holidays and were not allowed to take any leave including the annual leave. The Respondent did not pay them during the public holiday of compensate them for the public holidays worked.
7. The Respondent did not make any contribution towards their NSSF scheme and therefore they prayed to be paid gratuity.
8. The circumstances leading to their dismissal was that, the Respondent on 30th September, 2016 ordered the drivers to return all the motor vehicles and surrender their keys. While the other employees being the mechanics and the turn boys were equally ordered to stay away together with the drivers.
9. It is contended that no reason was given for the Respondent's action and that their employment was terminated without notice, hearing or payment of their terminal dues.
10. The claimants aver that on further inquiry on the reason for the termination, they were informed that their position had become redundant and that the director of the company was planning to relocate out of the Kenya.
11. During hearing the 1st claimant, **Paul Ocheso Otengo**, testified as Cw-1 and produced authority to act on behalf of the other claimants dated 9.11.2015. He then adopted his statement dated 7.5.2019 and testified that they were sacked when they could not agree with the Respondent and that the termination was not preceded by a notice or hearing.
12. On cross examination by **Maina Advocate**, the witness testified that he was sacked in the year 2016. That their work entails transporting goods from the Respondent's warehouse to their clients all over the county i.e. Kisumu, Mombasa and in the process could work more than the number of hours provided by the law.
13. On further cross examination, CW-1 testified that at the time of filing this suit the 7th and 9th claimant had given their consent for the suit to be filed and later were taken back by the Respondent. He testified that there has never been any strike at the Respondent's company and that his vehicle was handed over to the Respondent before the termination and the allegation that the vehicle he was driving was lost is not true. That he was terminated by the Respondent himself.

Respondents case.

14. The Respondent entered appearance on the 31st January, 2017 and filed a response to Claim on the 25th September, 2018 through the firm of Kimatta and company Advocates.
15. The Respondent conceded to employing the claimants herein however that save for the 7th and 9th Claimant the other claimants participated in an illegal strike which was not sanctioned by the labour office in the months of august and September, 2016 and in October, 20016 they down their tools and left the Respondent employment on their own volition.
16. That during the said strike Motor vehicle registration number KBL 272A which was allocated to the 1st Claimant was stolen and has never been recovered to date. Further that during the time all active contract were frustrated due to non-compliance.
17. The Respondent avers that all it employee reported to work at 8am to 5pm and never worked over weekends or public holidays as alleged. Further that all employees who worked out of station were duly compensated.
18. The Respondent also stated that it had an agreement with the claimants for each of them to take 2-3 days of the week as leave which was still paid, therefore the prayer for leave is not tenable.
19. The Respondent also stated that the 1st claimant worked for it for less than a year in 2013 and secured employment at Brookside limited where he worked for 1 ½ years and then taken back by the Respondent at the end of the year 2015.the 2nd claimant worked between 2011-2014 and left Respondent for Jolivima Limited only to come back in the year 2016. The 3rd claimant was employed in 2015 and left in 2016. The 4th Claimant was employed 2013 and left employment the same year. The 5th claimant worked for the year 2016 only while the 6th and

8th Claimant were employed in the year 2015 and all left before completing a year at the Respondents employ.

20. It was then contended that none of the claimant were dismissed rather that they left the Respondent employment on their own volition.

21. The Respondent called one witness, **Abel Wayoyi** as the RW-1 who adopted his witness statement dated 24.9.2018 and in addition stated that the 7th and 9th Claimant returned to work after absconding employment and they were taken back unconditionally. He testified that the claimant gave the Respondent some conditions however when the Respondent refused to comply with their conditions and instead insisted on fitting tracking systems on the vehicles, the claimants went on strike and then left employment. He testified further that the Respondent's employees worked from 8am-5pm and half day on Saturday from 8am-2pm. Also that they never worked on any public holiday.

22. Upon cross-examination by Juma Advocate, RW-1 testified that the two claimant returned to work on their own volition and requested to be re-employed.

Claimants' submissions.

23. It was submitted from the onset that the claimants employment was unfairly terminated by the Respondent as there was no procedural or substantive fairness. It was argued that the claimants were terminated without any notice or reason and were merely directed to stay away from the Respondent's premises. They reinforced their argument by citing the case of **Rashid Jeneby V Prime Bank Limited [2015] eKLR** and the case of **Sikuku Nzuvi Ngii V Gacal Merchants Ltd [2015] eKLR**.

24. They argued that the Respondent's argument that the Claimants participated in a strike and later left employment on their own volition is not justified as no evidence was tabled before this Court by the Respondent neither is there evidence to show steps taken by the Respondent to reach out to the said employees who allegedly absconded duty. In this they cited the case of **Moses Daniel Kyalo V Treadsetters Tyres Limited[2019] eKLR**.

25. They then submitted that the evidence before this court tilts in favour of the claimant having been wrongly terminated and they thus prayed for the reliefs to be granted as prayed.

Respondent's Submissions.

26. The Respondent on the other hand submitted that all the claimants never worked continuously at the Respondent as all worked at a piece rate basis as demonstrated under paragraph 13(c) of the Respondent response to claim. It was argued that the Claimant never challenged that fact in their pleadings or during hearing.

27. It was submitted that the claimants engaged in an illegal strike sometimes in the month of August and September, 2016 which strike arose from the Respondent attempt to put tracking system in their motor vehicles which action did not augur well with the claimants causing them to abscond duty. Therefore, that they were never terminated but deserted duty.

28. The Respondent then urged this Court to find in its favour and dismiss the claimants claim with costs.

29. I have considered the evidence and submissions of the parties herein. The issue for this court's determination are as follows;

1. Whether the claimants were terminated or absconded duty.

2. If they were terminated, if the termination was fair and justified.

3. Whether the claimants are entitled to the remedies sought.

ISSUE NO. 1

30. The claimants have submitted that on 30/9/2016 all claimants were ordered to return and surrender their keys. The mechanics and turnboys on the other hand were ordered to stay away. No reason was given for the order.

31. The claimants aver that on further inquiry as to why the order was given, the claimants were told that they had been declared redundant.

32. The respondents on the other hand aver that the claimants participated in an illegal strike and downed their tools in August, September and October 2016 and left the respondent's employment on their own volition.

33. They contend that even one motor vehicle driven by the 1st claimant got lost never to be traced. They aver that the claimants got jobs in other organizations.

34. The claimants denied ever going on strike. Despite the respondent insisting that the claimants deserted duty, there is no indication that they were issued with show cause letters to indicate why they should not be terminated for absconding duty.

35. That being the case, it is my finding that the claimants were terminated and never absconded duty.

ISSUE NO. 2

36. Having found that the claimants were terminated and having found that the claimants were never subjected to any disciplinary process and also having found there were no valid reasons established to warrant dismissal, I find the dismissal of the claimants was unfair and unjustified as per Section 45 (2) of the Employment Act 2007.

ISSUE NO. 3: REMEDIES

37. Having found as above, I find the claimants are entitled to the remedies as follows;-

1. PAUL OCHESO OTENGO

1. 1 Month salary in lieu of notice 19,654/= (including 4,654/= underpayment)

2. Underpayments as pleaded from 2013 to 2016 (rest time barred)

= 449, 438.25/=

3. Leave pay for 1 year

= 19,654/= there being no indication that leave for other years was applied for and denied

4. Service pay equivalent to 15 day salary for each year worked

= $\frac{1}{2} \times 19,654 \times 2 = 19,654/=$

5. 8 month's salary as compensation for unlawful termination

= $8 \times 19654 = 157,232/=$

GRAND TOTAL = 665,632/=

Less statutory deductions

2. HEZRON KHAKALI

1. 1 month's salary in lieu of notice = 19,654

2. Underpayments as pleaded from 2013 to 2016 rest being time barred = 353,438/=

3. Leave pay for 1 year 19,654, there being no indication that leave for other years was applied for and denied.

4. Service pay equivalent to 15 day salary and each year worked being 4 years

= $\frac{1}{2} \times 19,654 \times 4$

= 39,308/=

5. 8 month's salary as compensation for unlawful and unfair termination

= $8 \times 19,654 = 157,232/=$

GRAND TOTAL = 589,286/=

Less statutory deductions

3. MORRIS LUGADO KHAKALI

1. 1 month salary in lieu of notice = 19,654/=

2. Underpayment as pleaded = 214,810/=

3. Leave pay for 5 months

$$= 5/12 \times 19,654 = 8,189/=$$

4. Service pay for 1 year

$$= \frac{1}{2} \times 19,654/=$$

$$= 9,827/=$$

5. 3 month's salary as compensation for unlawful & unfair termination

$$= 3 \times 19,654/=$$

$$= 58,962/=$$

GRAND TOTAL = 311,442/=

Less statutory deductions

4. DAVID MUKAISI

1. 1 month salary in lieu of notice = 19,654/=

2. Underpayments as pleaded from 2013 the rest being time barred = 337,859/=

3. Leave pay for 1 year and there being no indication that rest was applied for and denied

$$= 17,090/=$$

4. Service pay for 3 years at 15 days for each year worked

$$= \frac{1}{2} \times 19,654 \times 3$$

$$= 29,481/=$$

5. 8 months salary as compensation for unfair and unlawful termination = $8 \times 19,654 = 157,232$

GRAND TOTAL = 561,316/=

Less statutory deductions

5. DAVID ATEKA GANDI

1. 1 month salary in lieu of notice = 19,654/=

2. Underpayments as pleaded = 92,578/=

3. Prorata leave for 7 months = $7/12 \times 19,654 = 11,645/=$

4. 3 months compensation for unfair termination

$$= 3 \times 19,654$$

$$= 58,962/=$$

TOTAL = 182,839/=

Less statutory deductions

6. ROBERT KIPYEGON

1. 1 month salary in lieu of notice

$$= 12,071/=$$

2. Underpayment as pleaded

99,928/=

3. Leave for 1 year as pleaded

= 7,347.80

4. Compensation for unfair and unlawful termination at 5 months salary

= 5 x 12,071 = 60,355/=

GRAND TOTAL = 179,702/=

Less statutory deductions

7. KEVIN ODHIAMBO OCHIENG

1. 1 month salary as notice pay = 15,248/=

2. Underpayment as pleaded

= 189,877/=

3. Leave for 1 year = 9,281.50

4. Service pay of 15 days for each year worked = $\frac{1}{2} \times 15,248 = 7,624$ /=

5. 5 months salary as compensation for unfair and unlawful termination

= 5 x 15,248 = 76,240/=

GRAND TOTAL = 298,270/=

Less statutory deductions

8. NICHOLAS KIPKOECH BETT

1. 1 month salary in lieu of notice = 12,071.40

2. Underpayment as pleaded

= 127,142.40/=

3. Leave for 1 year = 7,343.30/=

4. Service pay for 2 years

= $\frac{1}{2} \times 12,071 \times 2 = 12,071$ /=

5. 5 months salary as compensation for unfair and unlawful termination

5 x 12,714.40 = 63,572/=

GRAND TOTAL = 107,772/=

Less statutory deductions

9. STANLEY KAMAU

1. 1 month salary in lieu of notice = 19,654/=

2. Underpayment from 2013 to 2016 the rest being time barred as pleaded = 403,789/=

3. Leave for 1 year = 19,654/=

4. Service pay for 6 years

= $\frac{1}{2} \times 19,654 \times 6 = 58,962/=$

5. 8 months compensation for unlawful termination

= $8 \times 19,654 = 157,232/=$

GRAND TOTAL = 659,291/=

Less statutory deductions

10. FREDRICK WALUANGA

1. 1 month salary in lieu of notice

= 15,248.20

2. Underpayment as pleaded

= 560,607/=

3. Service pay for 3 years

= $\frac{1}{2} \times 15,248 \times 3 = 18,372/=$

4. Leave pay for 1 year

= 15,248/=

5. 5 months salary as compensation for unlawful termination

= $5 \times 15,248$

= 76,240/=

GRAND TOTAL = 685,715/=

Less statutory deductions

The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF DECEMBER, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tanga holding brief for Korongo for Claimant - present

Kairu Maina for Respondents – present

Court Assistant - Fred