



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 174, 175, 176 & 178 OF 2017

- 1. PETER MUCHEMI MWANGI**
- 2. PENINAH WANJIRU MWANGI**
- 3. STEPHEN MACHARIA GACHIURI**
- 4. JAMES KING'ORI KAIRU.....CLAIMANTS**

VERSUS

BLUE SEAS CAR HIRE AND TOURS LIMITED t/a TEMPLE ROAD

TOTAL SERVICE STATION.....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent in 4 different suits asserting that they were dismissed on 15th September 2016 illegally and without according them a fair hearing and that the Respondent had failed and or neglected to remit NSSF dues for the year 2016. The suits were consolidated only for purposes of hearing and disposal. The 1st Claimant who is the Claimant in the lead file Cause No. 174 of 2017 is Peter Muchemi Mwangi. He averred that he was a tyre man and that he was employed on 7th July 2003 earning a salary of Kshs. 9,930/-. He sought compensation for the unfair, unprocedural and illegal and/or unlawful termination. He prayed for gratuity from 2003-2016, outstanding dues set out in the pension scheme – Kshs. 4,800/- and one month's salary in lieu of notice – Kshs. 9,930/- plus costs of the suit. The 2nd Claimant who is the Claimant in Cause No. 175 of 2017 is Peninah Wanjiru Mwangi. She averred the Respondent employed her as a shop attendant on 7th July 2003 and that she was earning Kshs. 10,650/- as at the time of her dismissal. She averred that the Respondent failed to remit her NSSF dues for the year 2016 and that she was not allowed a hearing. She averred that the Respondent did not prove any alleged misconduct prior to the dismissal nor was she served with a notice prior to termination. She sought compensation for the unfair, unprocedural and illegal and/or unlawful termination. She prayed for gratuity from 2003-2016, outstanding dues set out in the pension scheme – Kshs. 4,800/- and one month's salary in lieu of notice – Kshs. 10,650/- plus costs of the suit. The 3rd Claimant who is the Claimant in Cause No. 176 of 2017 is Stephen Macharia Gachiuri. He averred that he was a pump attendant and that he was employed on 7th July 2003 earning a salary of Kshs. 9,930/-. He sought compensation for the unfair, unprocedural and illegal and/or unlawful termination. He prayed for gratuity from 2003-2016, outstanding dues set out in the pension scheme – Kshs. 4,800/- and one month's salary in lieu of notice – Kshs. 9,930/- plus costs of the suit. The 4th Claimant who is the Claimant in Cause No. 178 of 2017 is James King'ori Kairu. He averred that he was a pit stop mechanic and that he was employed on 7th July 2003 earning a salary of Kshs. 10,730/-. He sought compensation for the unfair, unprocedural and illegal and/or unlawful termination. He prayed for gratuity from 2003-2016, outstanding dues set out in the pension scheme – Kshs. 4,800/- and one month's salary in lieu of notice – Kshs. 10,370/- plus costs of the suit.

2. The Respondent filed a defence in which it admitted employing the Claimants as well as the fact of termination of contract on 15th September 2016. It averred that it ran the petrol station dealership with Total Limited but because it had differences with the company the dealership was taken over and handed over to someone else and the Respondent therefore had to hand over the station to the new owner with all the equipment, employees etc. The Respondent averred that the Claimants save for Peninah Wanjiru who resigned a few months after the new owner took over were still employed by the dealer who took over the station. The Respondent averred that vide a letter dated 25th April 2017 it sought for better particulars but the Claimant filed the suit without responding to the said letter. The Respondent averred that the Claimants were not entitled to the prayers sought in their claims and prayed that the suits be dismissed with costs.

3. The Claimants testified as did the Respondent's witness Edwin Wariungu Nyuguto. Peter Muchemi Mwangi testified that he was dismissed on 15th September 2016 as the station had been taken over and that he was not given anything. In cross-examination he testified that he was dismissed on 15th September 2016 and was not to return the next day. He stated that he was still employed at the station as he works for the new dealer. Stephen Macharia Gachiuri testified that he was a former employee of the Respondent from 4th May 2009 as a

pump attendant. He stated that he went to work and found Edwin was not there and there was another lady who did not speak to them. He stated that he was at the Station called Muhoya and that the 2 stations were Edwin's. He testified that in the claim he was working at Temple Road. He stated that the person who took over had his own employees and he did not refuse to work for the new owner. Peninah Wanjiru Mwangi testified that she was working as a shop attendant and that on 15th September 2016 she was notified by Edwin that their work had ended. She stated that she left and started business. In cross-examination she stated that she did not continue to continue working with the new dealer and denied categorically having worked after the termination of the services of the Respondent. James King'ori Kairu testified that he was a mechanic for the Respondent and that his work was stopped and the employer left and the station was taken over by Total. He said that he was employed for 3 months and left. He testified that he worked with Muchemi and that Peninah continued then left. He stated that he was not told of the intent to terminate and therefore he was seeking compensation.

4. The Respondent's witness Edwin Nyuguto testified that he used to run a petrol business at Temple Road and that the dealership was taken over by Total. He was cross-examined and confirmed the station was taken over by Total in September 2016 and that he handed over the stocks and there was correspondence. He was asked where this was and he admitted not having provided it to court. He stated there was an elaborate agreement on the takeover and he stated he had not produced that in court. He admitted receiving the demand and that his lawyer sought various items per the letter in reply.

5. The parties filed submissions and in their submissions the Claimants submitted that the Respondent ran a business that was allegedly taken over by someone else. The Claimants submitted that the Respondent had not attached any correspondence or agreement on the take over. The Claimants submitted that the Respondent had a burden under Section 107 of the Evidence Act to prove the takeover. The Claimants submitted that the Respondent had no answer to the suits and that the Claimants were terminated without notice.

6. The Respondent submitted that it did not terminate the services of the employees but that Temple Road Total Service Station, a petrol station where the Claimants worked was taken over by Total Kenya Limited who were the owner and handed over to the new dealer. The Respondent submitted that the takeover was not peaceful and he was not given notices and that the new dealer took the business as a going concern together with everything therein and all the employees. The Respondent submitted that the employment of the Claimants was not terminated by the Respondent. It submitted that Peninah continued working and she was an untruthful witness. The Respondent submitted that the suits ought to be dismissed.

7. The Claimants were employees of the Respondent that is not in doubt. They assert they were dismissed on 15th September 2016 and that they were not given notice. The Respondent on its part asserts that the termination did not take place as what took place was a takeover of the dealership by Total Kenya Limited. The facts seem not to be in dispute that an event occurred on 15th September 2016 abruptly and without notice. Indeed, the testimony of the witnesses lines up that there was a take over by a hostile party who did not even speak to the employees confirming the takeover was not a cordial affair. The Respondent did not attach the separation agreement and we can only guess what it may have contained in terms of the handover of staff. Be that as it may, it is clear the employees continued working for the Respondent including Peninah who lied under oath. The Claimants were therefore only disadvantaged in that they were not in continuous service and some later opted to quit working for the new dealer. Peninah, to do business, if that is to be believed and for Gachiuri who did not wish to continue working for the new dealer.

8. In my considered view, taking into account the abrupt change of ownership and the resultant job losses, it would be my finding that a termination took place for good cause albeit without notice. In any termination of employment the Court has to take into account the reasons for the termination and if there is unlawfulness can award compensation. In this regard I would find in favour of some of the Claimants in so far as there was termination with no notice though not sufficient to bring into play the full force of Section 43, 45 and 49 of the Employment Act. In determining what measure of remedy to give under Section 49 of the Employment Act, the Court has to consider various factors. Under the said Section, I have to consider the wishes of the employee; the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the employee's length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; the opportunities available to the employee for securing comparable or suitable employment with another employer; the value of any severance payable by law; the right to press claims or any unpaid wages, expenses or other claims owing to the employee; any expenses reasonably incurred by the employee as a consequence of the termination; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee. As the event was unprecedented and unexpected each employee would be entitled as follows:-

a. Peter Muchemi Mwangi

- i. NSSF dues to be paid on his account – Kshs. 4,800/-
- ii. one month's salary in lieu of notice – Kshs. 9,930/-

b. Peninah Wanjiru Mwangi

- i. NSSF dues to be paid on her account – Kshs. 4,800/-

c. Stephen Macharia Gachiuri

- i. NSSF dues to be paid on his account – Kshs. 4,800/-
- ii. one month's salary in lieu of notice – Kshs. 9,930/-

d. James King'ori Kairu

- i. NSSF dues to be paid on his account – Kshs. 4,800/-
 - ii. one month's salary in lieu of notice – Kshs. 10,370/-
- e. Costs to be capped at Kshs. 40,000/- for all the 4 files.

It is so ordered.

Dated and delivered at Nyeri this 12th day of February 2020

Nzioki wa Makau

JUDGE