



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 460-472 OF 2017

ALKANO ASHEDO GUYO & 12 OTHERS.....CLAIMANTS

VERSUS

JIANGXI ZHONGMEI ENGINEERINGCONSTRUCTION

CO. LTD.....RESPONDENT

JUDGMENT

1. The Claimant herein have each sued the Respondent for their alleged wrongful and unprocedural dismissal from employment and the alleged failure to pay them their terminal benefits. The Claimants aver that they were employed by the Respondent on divers dates as general workers, tipper drivers, water tank drivers, foremen, lab attendants, security officers, electricians, steel fixers in the construction of the Marsabit – Turbi road. They all assert that they were wrongfully/unprocedurally dismissed. The Claimants aver that their employment together with the termination/dismissal were marred with gross and /or blatant contravention of the employment Act and other enabling provisions of the law. The Claimants aver that the Respondent failed to accord them due procedure in the process of dismissal thereby violating Sections 41 and 45 of the Employment Act. The Claimants seek a declaration that the termination process as carried out by the Respondent against each of them was unlawful and they thereby seek salary in lieu of notice, gratuity/service benefits, compensation for unfair termination, underpayment of wages, annual leave dues, unpaid house allowance, Sundays underpayments and costs of the suit as well as interest on the sums claimed. In their affidavits of evidence, the Claimants asserted that they worked diligently and with full commitment until the contracts of service were wrongfully, unprocedurally, unfairly, unjustifiably and/or unlawfully terminated and they were not paid their lawful and/or terminal dues. The Claimants contended that the Respondent never provided them with any reasonable housing and/or paid any house allowance, it paid them wages less than what is required in law per hour, it made them work overtime without recompense, failed to provide personal protective equipment (PPE), made them work on public holidays and even on rest days without payment, never allowed them annual leave during the subsistence of employment, never issued them notices of the intention to terminate their services and/or give any warning and it terminated their services without informing them of the reason(s) for termination, without a notice to show cause and without a hearing. They asserted that despite several complaints to the Respondent about its contravention and breach of the law, the Respondent never rectified the situation which forced them to complain to the their union the Kenya Building Construction Timber and Furniture Union (KBCTFU). They assert that the Union approached the Respondent and brokered a collective bargaining on behalf of employees on one side with the Respondent on the other which agreement was signed on 27<sup>th</sup> July 2012. They asserted that despite the existence of the collective bargaining the Respondent failed to comply with the terms therein and they therefore reported to the Union which informed the County Government of Marsabit of the Respondent’s continued breach of the terms and conditions of the collective bargaining agreement and the contravention of the law prompting the County Commissioner to write a letter requiring the Respondent to adhere to the law but again this directive was not complied with. The Claimants prayed to the court to declare the termination of employment illegal, unlawful, unfair, unjustified and order the Respondent to pay the sums claimed.

2. The matters proceeded as undefended causes as the Respondent did not appear or file a defence. The Claimants’ advocate sought for consolidation of the files for purposes of hearing and proposed that the costs before consolidation be apportioned to each file and after consolidation on the main file. Two Claimants Alkano Ashedo Guyo (Claimant in Cause No. 460 of 2017 – the lead file) and Wako Kote Jaldessa the Claimant in Cause No. 469 of 2017 testified. They stated that they were employed in various capacities by the Respondent in the project for the construction of the Marsabit-Turbi Road project. They stated that they were dismissed without notice and without any warning. They stated that they were not paid their terminal dues in addition to the underpayment and failure to provide housing.

3. The Claimants filed written submission and in them submitted that the Causes were undefended and the Respondent must therefore be held 100% liable to compensate the Claimants. They placed reliance on the case of **Amina Guyo Dalacha & 19 Others v Jingxi Zhongmei Engineering Construction Company Limited [2019] eKLR** and submitted that in the undefended case such as the present one, the only issue that remains for determination is the question of quantum. They submitted they were entitled to the remedies sought.

4. The question of liability was moot upon entry of interlocutory judgment and only the issue of quantum remained. The Claimants asserted the issue of quantum was the only aspect to be determined. The court finds that though the suits were undefended, the issue of proof for the monetary aspects of the claim remain and had to be proved by the Claimants. As pleaded, the Claimants assert underpayment for hours worked daily and on Sundays and public holidays. However, in the absence of factum, that is to say, concrete evidence, this Court cannot determine the precise amounts due to each Claimant on account of these claims as no computation was given on the actual Sundays and public holidays in order to ascertain what was due to whom and for what days. As regards house allowance, the Claimants failed to prove that they are entitled to an award on their claims on the unpaid house allowance since they did not exhibit any evidence of their payments to demonstrate the pay did not include house allowance. The Claimants failed to prove that they are entitled to the unpaid leave dues or that the alleged dismissals were without notice. They did not prove the suits on a balance of probabilities. The inevitable conclusion is that though the suits by the Claimants are undefended they did not tender any evidence to back their claims and the Claimants suits are thus dismissed but with no order as to costs.

5. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of March 2020**

**Nzioki wa Makau**

**JUDGE**