



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT**  
**AT MOMBASA**

**CAUSE NUMBER 744 OF 2016**

**[Heard together with Cause Number 745, 746, 747 and 748 all of 2016]**

**BETWEEN**

- 1. SAMUEL MANGALE MADZAO [744]**
- 2. ELIAS AKIBA BALO [745]**
- 3. IBRAHIM KHAMBU SAID [746]**
- 4. KAZUNGU KAHINDI KIRAO [747]**
- 5. CHENGO KATANA KITSAO alias EVANS BAYA[748]....CLAIMANTS**

**VERSUS**

**DHANJAL INVESTMENTS LIMITED t/a**  
**TRAVELLERS BEACH & HOTEL.....RESPONDENT**

*Rika J*

*Court Assistant: Andrew Mwabanga*

*Kenga & Company Advocates for the Claimants*

*Oduor Siminyu & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimants filed separate Statements of Claim on 4<sup>th</sup> October 2016. The Claims were heard together on 25<sup>th</sup> September 2019.
2. The 1<sup>st</sup> Claimant states he was employed by the Respondent as a Painter/ Supervisor in August 2006, earning a daily wage of Kshs. 150. His daily rate was improved to Kshs. 400 by the time he left employment. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants were employed in January 2007 as Helpers/ Labourers, on an initial daily wage of Kshs. 250, which had risen to Kshs. 300 daily, by the time they left employment. The 4<sup>th</sup> Claimant was employed on 11<sup>th</sup> June 2006 as a Mason, earning Kshs. 250 daily. He left on a daily rate of Kshs. 350. The 5<sup>th</sup> Claimant was employed as a Birds Keeper on 18<sup>th</sup> February 2003, on a daily wage of Kshs. 120. His daily rate was Kshs. 350 by the time he left employment.
3. All Claimants left employment on 4<sup>th</sup> May 2016. They aver, their respective contracts were terminated by the Respondent unfairly and unlawfully. The pray for Judgment against the Respondent as follows: -

**A.**

**1<sup>st</sup> Claimant:** notice at Kshs. 10,400; annual leave over a period of 10 years at Kshs. 84,000; severance pay at 15 days' salary for each completed year of service at Kshs. 60,000; and compensation for unfair termination, equivalent of 12 months' salary at Kshs. 124,800 – **total Kshs. 279, 200.**

**2<sup>nd</sup> Claimant:** notice at Kshs. 7,800; annual leave over a period of 7 years, at Kshs. 44,100; severance pay at 15 days' salary for each completed year of service at Kshs. 31,500; and compensation for unfair termination, equivalent of 12 months' salary at Kshs. 93,600 – **total Kshs. 177,000;**

**3<sup>rd</sup> Claimant:** notice at Kshs. 7,800; annual leave over a period of 9 years at Kshs. 56,700; severance pay at 15 days' salary for each completed year of service at Kshs. 40,500; and compensation for unfair termination, equivalent of 12 months' salary at Kshs. 93,600 – **total Kshs. 198,600.**

**4<sup>th</sup> Claimant:** notice at Kshs. 9,100; annual leave over a period of 10 years at Kshs. 73,500; severance at 15 days' salary for each completed year of service, at Kshs. 52,500; and compensation for unfair termination, equivalent of 12 months' salary at Kshs. 109,200 – **total Kshs. 244,300.**

**5<sup>th</sup> Claimant:** notice at Kshs. 9,100; annual leave over a period of 13 years at Kshs. 95,550; severance at 15 days' salary for each completed year of service at Kshs. 68,250; and compensation for unfair termination, equivalent of 12 months' salary at Kshs. 109,200 – **total Kshs. 282,100.**

**B.** Interest on the sums above, from 4<sup>th</sup> May 2016.

**C.** Costs.

4. The Respondent filed in standard form, Statements of Response, on 22<sup>nd</sup> November 2016. Its position is that the Claimants were in casual employment. The Respondent did not terminate the Claimants' contracts, but simply stopped hiring their services, after they were involved in stealing from the Respondent's premises. The Claimants were not in regular employment. They were issued notices and warnings severally. Their Claims have no merit, and should be dismissed with costs.

5. Hearing was scheduled in Open Court, with the participation of Parties' Advocates, for 25<sup>th</sup> September 2019. The Respondent and its Advocates did not attend Court, and hearing proceeded *ex parte*. Claimant No. 1 gave evidence on behalf of the Claimants.

6. On 1<sup>st</sup> October 2019 the Respondent filed an Application seeking to have the hearing reopened. The matter came up for mention on 15<sup>th</sup> November 2019 when the Court was informed that the Parties were negotiating settlement. On 7<sup>th</sup> February 2020, Parties informed the Court there was no settlement, and were directed to file their Closing Submissions. The matter was last mentioned on 7<sup>th</sup> October 2020, when the Claimants informed the Court that they had filed and served their Submissions upon the Respondent. They served the mention notice. The Respondent did not file Submissions, attend Court or prosecute the Application dated 29<sup>th</sup> September 2019. The Court recorded that Judgment would be delivered on notice.

7. The 1<sup>st</sup> Claimant reiterated the contents of the Pleadings filed by the Claimants, in his evidence before the Court: the Claimants worked for the Respondent for many years; they worked in continuity and could not be deemed as being in casual employment; the Respondent did not file any employment records with its Pleadings, to contradict the Claimants; the Claimants were dismissed on the same date, based on the same allegations; they were not given a notice or hearing; and were denied annual leave and house allowance.

**The Court Finds:** -

8. The Respondent filed bare Statements of Response. The record shows that the Respondent asked for time to file documents. The Court placed the Respondent at liberty to file documents within 30 days, on 12<sup>th</sup> February 2019. None was filed.

9. To compound this default, the Respondent failed to attend Court on the date appointed by the Parties, for hearing. An Application filed subsequently, to set aside the *ex parte* proceedings was never prosecuted. ***That Application has been overtaken by events and is expunged from the record.*** Parties were directed to file Closing Submissions, which the Respondent did not. The Court was told that Parties were negotiating settlement. None was recorded. The Respondent was notified to attend Court on many occasions, including on 7<sup>th</sup> October 2020 when the last orders issued. There was repeated failure by the Respondent, to participate in the proceedings.

10. The Pleadings filed by the Respondent in the end are unsupported by any form of evidence. They are not backed by any Legal Submissions. The Evidence adduced by the Claimants is without challenge.

11. However, that Evidence, unchallenged as it is by the Respondent, does not establish all the facts alleged by the Claimants, and does not support grant of all the prayers in the respective Claims. The Court accepts from the outset, that the Claimants were regular Employees of the Respondent, having worked for years in continuity.

12. First, they seek severance pay. They specifically cite Section 40 of the Employment Act, implying that they left employment via redundancy. They did not give evidence about redundancy. They stated that the Respondent suspected them of stealing at the workplace. They did not allege anywhere, that termination was based on redundancy. The prayers for severance pay are rejected.

13. Secondly, they similarly plead notice specifically under Section 40 of the Employment Act. There was no redundancy, and there is no

notice payable under redundancy law.

14. The Court does not find fault with the prayers for notice and compensation based on Section 49 of the Employment Act. There is similarly no reason to doubt the prayers for annual leave, the Respondent having failed to exhibit employment records and to give oral evidence. The actual reason for termination has not been established. The Respondent merely alluded to theft by the Claimants, as the reason leading to termination, at paragraph 5 of the Statements of Response. There was no investigation or disciplinary hearing on the allegation of theft. It is not even suggested what was stolen, and by which of the Claimants, and which date. It is the barest of allegations. Termination did not conform with the standards of fairness and proof, prescribed under Sections 41, 43, 45 and 47[5] of the Employment Act 2007. It was unfair.

15. The Claimants did not all work for the same number of years. The Court has taken this into account in assessing the compensation to be paid. They did not contribute to the circumstances leading to termination. There were no complaints from the Respondent based on discipline and performance. They were paid nothing on termination, after long years of service.

16. In sum, the Court finds in favour of the Claimants and ***ORDERS:*** -

***a. The Application filed by the Respondent on 1<sup>st</sup> October 2020 is expunged from the record.***

***b. It is declared that termination of the Claimants' contracts of employment was unfair.***

***c. The Respondent shall pay to: -***

***I. 1<sup>st</sup> Claimant: notice at Kshs. 10,400; annual leave at Kshs. 84,000; and equivalent of 10 months' salary in compensation for unfair termination at Kshs. 104,000 – total Kshs. 198,400.***

***II. 2<sup>nd</sup> Claimant: notice at Kshs. 7,800; annual leave at Kshs. 44,100; and equivalent of 7 months' salary in compensation for unfair termination at Kshs. 54,600 – total Kshs. 106,500.***

***III. 3<sup>rd</sup> Claimant: notice at Kshs. 7,800; annual leave at Kshs. 56,700; and equivalent of 9 months' salary in compensation for unfair termination at Kshs. 70,200 – total Kshs. 134,700.***

***IV. 4<sup>th</sup> Claimant: notice at Kshs. 9,100; annual leave Kshs. 73,500; and equivalent of 10 months' salary in compensation for unfair termination at Kshs. 91,000- total Kshs. 173,600.***

***V. 5<sup>th</sup> Claimant: notice at Kshs. 9,100; annual leave at Kshs. 95,550; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 109,200- total Kshs. 213,850.***

***d. Costs to the Claimants.***

***e. No order on interest.***

Dated and delivered at Mombasa this 12<sup>th</sup> day of October, 2020

**James Rika**

**Judge**