



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

CAUSE NUMBER 438 OF 2016

[Consolidated with Cause Nos. 439, 440, 441, 442, 443, 444, 445, and 446 all of 2016]

BETWEEN

- 1. SWALEH ALI KALUME [438]**
- 2. JUMAA BAYA NYUNGA [439]**
- 3. MUNGA NYAMAWI MUNGA [440]**
- 4. BEJA MUNYIKA [441]**
- 5. BAGENI OMARI NGENI [442]**
- 6. SAMSON JUMA CHARO [443]**
- 7. KAHINDI KARISA CHARO [444]**
- 8. HASSAN KOMBO ZUNA [445]**
- 9. MBURA HAMISI GAMBO [446].....CLAIMANTS**

VERSUS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Kenga & Company Advocates for the Claimants

Isaac Onyango & Company Advocates for the Respondent

JUDGMENT

1. The 9 Claimants filed separate Claims against their former Employer, on diverse dates, in the year 2016. By consent of the Parties, the Claims were consolidated through an order recorded on 12th February 2018, to be heard under Cause Number 438 of 2016.

2. The 1st and 2nd Claimants gave evidence for the Claimants on 3rd March 2020. They closed their case on 7th October 2020, when

Respondent's Human Resource Manager Yeri Kombe, gave evidence for the Respondent, closing the hearing.

3. The Claimants' position is that they were employed by the Respondent on diverse dates, and in various positions. The various positions included storekeeper; mechanic; turn boy; store clerk; messenger; and, general labourer. They last earned monthly salaries shown in their respective Claims.

4. Their contracts were terminated by the Respondent on 31st March 2016. They aver, termination was on account of alleged redundancy. The Respondent did not follow the law and contract which governed Parties' relationship on termination. Termination was capricious, malicious, wrongful, unlawful, illegal, unfair and/ or un-procedural. They seek Judgment against the Respondent for: -

- a. Notice of 1 month.
- b. Annual leave over the period of service.
- c. Severance pay.
- d. Compensation for unfair termination.
- e. Interest from the date of termination till payment is made in full.
- f. Costs.

5. The Respondent filed Statements of Response in standard form, on 14th July 2016. It is conceded that the Claimants were employed by the Respondent. It is also conceded, that they left employment on redundancy. Redundancy was caused by loss of substantial business. The loss was occasioned by gross acts of lawlessness, disorderly conduct and lack of respect for the rule of law, on the part of the Claimants. The Claimants were involved in illegal industrial actions, which led to loss of the main commercial contracts the Respondent had with 3rd parties. The Claimants and relevant agencies were involved in the process and did not raise objection to the process. It was also the position of the Respondent that there was another Claim before this Court, **Cause No. 758 of 2015, Boniface Olienge & 67 others v. Hakika Transporters Services Limited**, arising from the same facts. The Respondent states, it would seek this Consolidated Claim is stayed, pending outcome of Cause No. 758 of 2015. The Respondent urges the Court to dismiss the Claim with costs.

6. The Respondent does not seem to have pursued staying of proceedings as intimated above. Parties proceeded to the conclusion of the current Claim, without mention of other proceedings pending elsewhere.

7. The 1st Claimant restated, that the Claimants were employed by the Respondent. They were not heard before termination. They were not involved in any meeting with the Respondent. There was no notice issued upon them. It is not true, that the Respondent had diminished work. The 2nd Claimant fully associated himself with the evidence of the 1st Claimant.

8. Cross-examined, the 2 Claimants stated that they did not have employment letters showing they worked from the dates pleaded. They did not have evidence of salary paid to them, on the dates pleaded as the dates of employment. The only document showing details of employment is the one titled 'Personal Particulars.' These include marital status, identity card numbers, name of Employer and designation of the Employee. The mechanics and turn boys worked on Respondent's vehicles. The Respondent had a contract, servicing Bamburi Cement Company Limited. If the Respondent sold its vehicles, the mechanics and turn boys would not have work. The Claimants did not know that the Respondent sold its vehicles, and that its contract with Bamburi Cement Company Limited, expired. They were aware that other Employees of the Respondent left on redundancy. There was no redundancy meeting held anywhere, between the Parties. The Claimant recalled they only attended an end-year party. The Respondent wrote a letter to the Claimants indicating diminished business. The Respondent paid N.S.S.F contributions for its Employees. The 1st Claimant described himself as a Tyre Man. He was paid Kshs. 48,000 by the Respondent in terminal dues. His gross monthly salary was Kshs. 18,000. The 2nd Claimant received terminal benefits of Kshs. 54,000. He used to earn Kshs. 350 daily. The 2 Claimants secured fresh employment, with other transport businesses, the same year they left the Respondent. Redirected, they told the Court that 'Personal Particulars' document was not a form of contract.

9. Yeri Kombe, relying on his Witness Statements filed on all the files, confirmed that the Claimants were employed by the Respondent. They left employment on redundancy. The Respondent had a commercial contract with Bamburi Cement Company Limited. The contract expired. The Respondent had to sell its trucks. Operations scaled down. This downturn in business was communicated to the Employees. There were consultative meetings, held at Respondent's yard in Changamwe and Global Workshop at Jomvu, both in Mombasa County. The Respondent adopted the principle of First in, Last Out. Redundancy was fair and lawful.

10. Cross-examined, Kombe told the Court that the document titled 'Personal Particulars,' is not an employment letter. It shows when the Employees were employed. Employees fill the document on recruitment. The salary is not shown on the document. The Claimants were served with notices of termination. They are dated 22nd February 2016. It is not shown when respective Claimants received these notices. The document titled 'Deductions' did not apply to the Claimants. The Claimants herein were not party to Cause No. 758 of 2015. The Claimants did not sign minutes of the meetings allegedly held with the Respondent prior to termination. Kombe told the Court there was a memo dated 25th January 2016, calling for a meeting. He did not have anything to show that this meeting took place, or that the Claimants attended. The Respondent notified the Labour Office about the exercise, on 22nd February 2016. It issued the notices of termination the same date. It had made its intention known. The notice to the Labour Office has a list of 110 affected Employees. The meeting involved all Employees, not merely the listed ones. Kombe did not have the initial work attendance registers.

11. Redirected, he told the Court that notice to the Labour Office was written on 22nd February 2016 and received on 24th February 2016.

Affected Employees were listed. It is not true that the documents were generated after the event. The Labour Office is notified, but does not manage redundancy process. The Respondent was mandated by law to manage the process. It selected Employees on defined criteria. It applied the principle of First in, Last Out. Employees were consulted. They were given information on the nature of redundancy, and criteria adopted. There were 2 preparatory meetings with them. Notices of redundancy were exhibited by the Claimants. It is the same notices they allege they did not receive. Redundancy situation is not in dispute; the Claimants allege it was unfair. The Respondent did not prejudice any Employee. It invited all Employees, not just the listed 110, for the meetings. There were over 500 Employees.

The Court Finds: -

12. The Claimants were employed by the Respondent Transport Company. They worked in different capacities, which are not disputed. The dates when they were employed are however, contested.

13. The Respondent relies on the dates given in the documents referenced 'Personal Particulars' and 'Hakika Transport Services Limited, Employees List,' in support of its position on the dates of employment.

14. Are these documents contracts of employment, under the Employment Act? Section 9[1] requires that a contract of service, for a number of working days of 3 or more months; or for work which cannot be completed in less than 3 months, shall be in writing.

15. The Claimants, adopting the dates of employment relied upon by either Party, merited written contracts under Section 9 of the Employment Act. Section 9 [2] gives the responsibility of writing contracts of employment to Employers, while 9[3] prescribes what the Employee must do, to signify that he has consented to the contract authored by the Employer. The Employee must sign his name thereon; or imprint an impression of his thumb or one of his fingers in the presence of a person other than his Employer. 9[4] requires the Employer, where the Employee is illiterate or cannot understand the language which the contract is written in, to explain the contract to the Employee, in a language understood by the Employee.

16. The documents titled 'Personal Particulars' are indicated to be signed by the Employees. They are not signed by any Witness for the Employees. The slots for Personnel Manager are not signed. They have other slots, on basic salary, house allowance and other allowance, which are left unfilled. They do not have dates, and the slots for department and section are similarly left blank. These documents are not contracts of employment.

17. The List of Employees is a document generated by the Respondent, giving details of Employees, including the dates of employment. It is however not signed by any of the Employee. They have not endorsed in any manner, the details of employment given therein. The details on the List are not to be taken as part of the details in the Claimants' contracts of employment.

18. Whereas Section 10 of the Employment Act allows Employers to give particulars of employment in instalments not later than 2 months after the beginning of employment, the Respondent has not shown that any of the 2 documents under reference, issued under Section 10 of the Employment Act.

19. A written contract of employment shall state, under Section 10 [2] [d] of the Employment Act, the date of employment.

20. If, in any legal proceedings, an Employer fails to produce a written contract or written particulars as required, the burden of proving or disproving an alleged term of employment stipulated in the contract, shall be on the Employer.

21. The Respondent has not shown a valid contract, establishing the dates of employment adopted by the Respondent. The Claimants allege different dates. It was for the Respondent to prove the dates it advances, or disprove the dates of employment advanced by the Claimants. The dates are important in determination of benefits which depend on the length of service. Because the Respondent has failed to discharge this obligation, the Court must adopt the dates given by the Claimants, as their dates of employment.

22. The 1st Claimant was employed in September 2009; 2nd Claimant in June 2008; 3rd Claimant in September 2007; 4th Claimant on 26th May 2006; 5th Claimant in June 2008; 6th Claimant on 29th December 2009; 7th Claimant in April 2010; 8th Claimant on 23rd November 2009; and 9th Claimant in February 2010.

23. On 22nd February 2016, the Respondent issued the Claimants notices, referenced 'Notice of Termination of Service on Account of Redundancy.' They were issued Certificates of Service, showing date of termination was in February 2016. The actual date is unspecified. The notices were to take effect after 1 month, which would be on 23rd March 2016. The Claimants were advised to go on annual leave up to 31st March 2016, a date by which termination notices would already have taken effect.

24. Although the Respondent alleges to have held meetings with the Claimants prior to 22nd February 2016, there is no evidence of a meeting held to prepare the Claimants and other Employees for redundancy. The Respondent exhibits memo from its Human Resource Manager Yeri Kombe, addressed to all Employees calling for meetings to be held on 8th February 2016 and 9th February 2016 at Global Yard and Changamwe Main Office respectively. Cross-examined, Kombe told the Court that he did not have anything to show that the meetings took place, or that the Claimants participated.

25. There is no evidence that consultative meeting or meetings took place, involving the Claimants, where they were advised on the reasons and extent of the proposed redundancy; the selection criteria; and redundancy packages. The Claimant testified and the Court sees nothing on record to disagree with them, that they only attended end-of-year party. This was not a consultative meeting, contemplated under Section 40 of the Employment Act.

26. Consultation must involve the Employee whether he is represented by his Trade Union, or is not a member of a Trade Union. Notice must issue to the Labour Office. As stated [Maraga JA, as he then was], in *Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 others [2014] e-KLR*, Section 40 of the Employment Act contemplates that the Employer must issue an initial and general notice, communicating its intention to undertake redundancy. This notice paves way for consultation. Consultation ought to be tripartite, involving the Employees and/ or their Trade Union, the Employer, and the Labour Office. In *Margaret Mumbi Mwago v. Intrahealth International [2017] e-KLR*, the Court restated the law under Section 40 of the Employment Act, clarifying that there are 2 notices contemplated under this law: *the first goes out simultaneously to the Employee or their Trade Union and to the Labour Office [general notice]; while the second, which is the termination notice goes out to the Employee. Article 13 of Recommendation 166, ILO Convention No. 158 Termination of Employment Convention 1982*, requires the Employer to provide Employees concerned in good time, with the relevant information including the reasons for the contemplated termination; the numbers and categories of Employees likely to be affected; and the period over which, the intended termination is intended to be carried out. The Article requires that the Employees and their Representatives are given adequate opportunity for consultation, on measures taken to minimize the number and effect of terminations. Measures to mitigate adverse effects on the Employees, must be part of the process. The State comes in, because it has a stake as a social partner, and has an obligation in overseeing that there is industrial peace, social cohesion, and economic stability, and that tripartism is sustained.

27. The Respondent wrote a notice to the County Labour Office Mombasa, referenced 'Declaration of Notice of Redundancy of Employees.' This notice issued simultaneous with the notices of termination issued to the Claimants and other Employees, dated 22nd February 2016. The Labour Office was, like the Claimants, being presented with a *fait accompli*. The general notice was merged with termination notice. These notices serve different legal objectives and should never be treated as one. If an Employer fails to issue termination notice, the Employer can pay salary in lieu of notice. If the Employer fails to issue the general notice, there is no such thing as pay in lieu of notice, made in favour of the Employee... or the Labour Office, to correct the default. The law intends that the general notice, and the termination notice, are issued separately, at different intervals, in the process of redundancy. There is no termination initially; just intended termination. There was no room for tripartism in this dispute. The Respondent was communicating a decision already taken. Of what use was the notice to the Labour Office, if the Labour Office would not play any part in the process? The Respondent misapprehended the law and the purpose to be served through tripartism. Kombe told the Court that, " *it is a requirement of the law to notify the Labour Office. The Labour Office is not to manage the process. The Respondent was doing this.*" The role of the Labour Office is more than that of a pedestrian, uninvolved bystander.

28. Was there a genuine redundancy situation? Did the Respondent have substantive reason to justify termination?

29. Bamburi Cement Limited wrote to the Respondent, a letter dated 9th October 2015, terminating a contract made with the Respondent, for transport of quarry products. There is an Invoice dated 19th August 2016, showing that the Respondent was compelled to dispose of its trucks and trailers, once the commercial contract with Bamburi Cement Limited was terminated.

30. The Claimants agree in their evidence that their work was related to transport of Bamburi products, and that without the trucks and trailers, there would be diminished business, and hardly any more work for them to perform.

31. The Court does not doubt that the Respondent was compelled to scale down its operations, in the absence of the Bamburi commercial contract. There was a genuine redundancy situation. There was valid reason justifying termination.

32. Termination was not fair with regard to procedure, but satisfied the minimum statutory standards on substantive justification.

33. The Claimants are entitled to compensation for unfair termination, based on procedural deficit.

34. The 1st Claimant worked for 6 complete years; 2nd, 7 complete years; 3rd, 8 complete years; 4th, 9 complete years; 5th, 7 complete years; 6th, 6 complete years; 7th, 5 complete years; 8th, 6 complete years; and 9th, for 6 complete years. They did not have term-definite contracts. The Respondent did not have any record of poor performance against any of the Claimants. There were no disciplinary complaints, against any of the Claimants, disclosed to the Court. Termination was not for any reason attributed to the Claimants. The Respondent alleged without foundation, that its financial quagmire was caused by acts of lawlessness attributed to the Claimants. They were ready to go on working, had the Respondent not fallen on hard times.

35. They are granted compensation for unfair termination as follows:

i. 1st Claimant: equivalent of 3 months' salary at Kshs. 54,000.

ii. 2nd Claimant: equivalent of 3 ½ months' salary at Kshs. 49,000.

iii. 3rd Claimant: equivalent of 4 months' salary at Kshs. 72,000.

iv. 4th Claimant: equivalent of 4 ½ months' salary at Kshs. 63,000.

v. 5th Claimant: equivalent of 3 ½ months' salary at Kshs. 63,000.

vi. 6th Claimant: equivalent of 3 months' salary at Kshs. 42,000.

vii. 7th Claimant: equivalent of 2 ½ months' salary at Kshs. 67,045.

viii. *8th Claimant: equivalent of 3 months' salary at Kshs. 54,000.*

ix. *9th Claimant: equivalent of 3 months' salary at Kshs. 60,120.*

36. The Claimants were issued notices of termination, dated 22nd February 2016. The notices took effect on 23rd March 2016, but the Respondent advised that the last day of employment would be 31st March 2016. The Court has adopted this date as the date of termination. It is fair to assume that the Claimants had notice of termination. The Court does not think notice pay is awardable.

37. The Claimants concede they received some amount in terminal dues from the Respondent. The List of Employees exhibited by the Respondent shows some tabulation, including severance pay was made. Neither the Claimants, nor the Respondent supplied the Court with full details of what was paid. What is certain is that the Respondent did not adopt the correct, complete years of service in calculating service pay, having adopted the wrong dates of employment from the outset.

38. Severance pay if awarded, as suggested on List of Employees exhibited by the Respondent, and by the unclear evidence from the Claimants, was based on shorter service periods than have been found due in this Judgment. ***The Respondent shall rework severance pay based on the number of complete years found due in this Judgment, and make payment, less what severance pay was received by the Claimants.***

39. The prayers for annual leave were not articulated by the Claimants in their Pleadings and Evidence. The Claimants just pray for annual leave, without giving evidence, even of an oral nature, which would enable the Court to hold that the Respondent ought to have brought forward documentary evidence, to discount Claimant's evidence on annual leave. There is no evidence at all, just bare prayers for annual leave. The Court is not able to grant these prayers.

40. *Costs to the Claimants.*

41. *Stay of execution of this Judgment allowed for a period of 30 days.*

42. *Interest allowed at the rate of 16% per annum from the end of the stay period, till payment is made in full.*

IN SUM, IT IS ORDERED: -

a. It is declared that redundancy was based on genuine economic reasons, but severely flawed on procedure.

b. The Respondent shall pay to the Claimants compensation for unfair termination as follows: 1st Claimant, Kshs. 54,000; 2nd Claimant, 49,000; 3rd Claimant, 72,000; 4th Claimant, 63,000; 5th Claimant, 63,000; 6th Claimant, 42,000; 7th Claimant, 67,045; 8th Claimant, 54,000; and 9th Claimant, 60,120.

c. The Respondent shall rework and pay to the Claimants severance, based on the correct years of service, as indicated in this Judgment.

d. Costs to the Claimants.

e. Stay of execution of this Judgment allowed for 30 days.

f. Interest allowed at the rate of 16% per annum from the end of the stay period.

Dated, signed and released to the Parties electronically, at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 15th day of December 2020.

James Rika

Judge