



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 527 OF 2016

MAKOKHA BARASA AGGREY.....1ST CLAIMANT

JAMES MWABILI MNYIKA.....2ND CLAIMANT

JACKSON TANDARA NGONYO.....3RD CLAIMANT

DAVID MAINGI JOSEPH.....4TH CLAIMANT

VS

FOREMOST LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This matter was initially handled **Makau J** who, with the consent of the parties, reserved judgment on the basis of submissions filed by the parties. However, in an *ex tempore* ruling dated 9th April 2018, my brother Judge directed that the matter be re-opened for hearing *viva voce*.

2. Counsel for the parties appeared before me on 26th April 2018 for pretrial directions and on 25th October 2018 I took evidence from the 1st and 3rd Claimants as well as from the Respondent’s Managing Director, Kassam Abdikader Dada. The parties also filed further submissions.

The Claimants’ Case

3. The Claimants’ claim is documented by a Memorandum of Claim dated 4th July 2016 and filed in court on even date. They state that they were employed by the Respondent on diverse dates between 2008 and 2016.

4. The 3rd Claimant specifically states that apart from working as an office clerk, he was required to perform the duties of a real estate agent and electrician without pay.

5. The Claimants claim that the Respondent terminated their employment on 30th April 2016, without justifiable cause and in violation of due procedure. They add that they were not paid their terminal dues and were not issued with certificates of service.

6. The Claimants claims as are as follows:

1st Claimant: Makokha Barasa Aggrey

- a. Unpaid salary for 8 months @ Kshs. 57,000.....Kshs. 456,000
- b. Remainder of contract (5 months).....285,000
- c. Notice pay.....57,000
- d. Prorata leave for 8 months.....35,072
- e. 12 months’ salary in compensation.....684,000

2nd Claimant: James Mwabili Mnyika

- a. Remainder of contract (5 months).....140,000
- b. Notice pay.....28,000
- c. Prorata leave for 8 months.....17,230
- d. 12 months' salary in compensation.....336,000

3rd Claimant: Jackson Tandara Ngonyo

- a. Balance of unpaid wiring contract.....Kshs. 54,568
- b. Prorata leave for 8 months.....147,692

4th Claimant: David Maingi Joseph

- a. Remainder of contract (5 months).....86,500
- b. Notice pay.....17,300
- c. Prorata leave for 8 months.....10,646
- d. 12 months' salary in compensation.....207,600

7. The Claimants further claim costs and interest.

The Respondent's Case

8. The Respondent's defence is contained in a Response dated 9th September 2016 and filed in court on even date. The Respondent admits that the Claimants were its employees. In this regard, the Respondent states that the 1st Claimant, Makokha Barasa Aggrey, was first appointed as Technical Operations Manager, on a one year contract effective 1st September 2015. He was paid a monthly salary of Kshs. 50,000 plus a house allowance of Kshs. 7,500.

9. The 1st Claimant worked until 28th September 2015 and then left without notice. He was re-employed on 24th February 2016 and was formally terminated on 23rd April 2016. The Respondent accuses the 1st Claimant of absenteeism, dereliction of duty, forgery and tardiness.

10. The Respondent states that the 2nd Claimant, James Mwabili Mnyika, was employed as a mason on 4th September 2015, specifically for a project in AMISON Camp in Dhobley, Somalia. He was employed on a one year contract at a monthly salary of Kshs 28,000 and was housed by the Respondent.

11. The UNSOA Dhobley contract expired on 3rd March 2016 but the 2nd Claimant was retained until 6th April 2016. The 2nd Claimant was formally discharged after a month's notice.

12. The 3rd Claimant, Jackson Tandara Ngonyo was employed as a general helper/storekeeper in November 2008. He worked on short term contracts as follows:

- a. 4th May 2009 to 15th December 2009;
- b. 4th January 2010 to 3rd March 2010;
- c. 7th March 2013 to 21st December 2013;
- d. 6th January 2014 to 20th December 2014;
- e. 5th January 2015 to 19th December 2015;
- f. 1st January 2015 to 30th April 2016.

13. The Respondent states that the 3rd Claimant was paid all his leave days. The Respondent denies having a separate wiring and agency contract with the 3rd Claimant.

14. The 4th Claimant, David Maingi Joseph was employed on 12th September 2015, as a semi-skilled helper for a project in AMISON Camp in Dhobley, Somalia.

15. In December 2015, the Somali Government gave an edict that all unskilled and semi-skilled work should be given to the local community, hence no foreign unskilled personnel would be employed. The 4th Claimant was therefore issued with a one month's notice of termination of contract.

Findings and Determination

16. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimants' employment was lawful and fair;
- b. Whether the Claimants are entitled to the remedies sought.

The Termination

17. The 1st Claimant's employment was terminated by letter dated 23rd April 2016 stating as follows:

"Dear Sir

REF: TERMINATION OF EMPLOYMENT

With reference to the letter of appointment issued on 24th February 2016 as an interim Workshop Manager and role representative for Quality Management System your probationary period in Foremost Limited will be due to end on 24th May 2016. As discussed with you we could not sustain your employment because your performance during the last two months of your probationary period has not met our expectations.

With due regards(sic) this letter serves a notice issued w.e.f. 23rd April 2016 giving notice ending on 30th April 2016. All accrued wages, income, leave days and benefits will be paid along with your end month salary.

I also take this opportunity to thank you for your service with the company and to wish you all the very best for the future. If you have any questions with respect to the contents of this letter kindly seek audience and outright clarification from the human resource office.

Thanks in advance,

Yours sincerely,

(Signed)

Mr. Olweny Adams-HR For Foremost Limited."

18. The foregoing letter presumes that at the time of termination, the 1st Claimant was serving probation. Section 2 of the Employment Act, 2007 defines a probationary contract as:

"a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period"

19. The Respondent did not provide any documentary evidence to support its assertion that at the time of termination, the 1st Claimant was on probation. On the face of it therefore, the termination was unprocedural. Moreover, if indeed the Claimant's performance was poor, the proper procedure would have been to point out his shortcomings with reasonable opportunity to improve (see *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR*)

20. There was no evidence of any attempt by the Respondent to comply with the law with regard to the termination of the 1st Claimant's employment. The Court therefore finds and holds that the termination was substantively and procedurally unfair and the 1st Claimant is entitled to compensation.

21. The employment of the 2nd Claimant, James Mwabili Mnyika was terminated by letter dated 6th April 2016 citing redundancy. While the 4th Claimant's termination letter dated 1st December 2015 gives no reason for the termination, the Respondent's Managing Director told the Court that the termination was triggered by a declaration by the Somali Government that unskilled and semi-skilled labour be reserved for the local community. This led to demobilization of foreign labourers, including the 4th Claimant.

22. What emerges is that the exit of the 2nd and 4th Claimants from the Respondent's employment was on account of redundancy. Section 2

of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“ the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

23. The law allows an employer to declare redundancy subject to the following mandatory conditions enumerated in Section 40 of the Employment Act:

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**
- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**
- (f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and**
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

24. From the evidence on record, the Respondent did not comply with the aforesaid conditions, thus rendering the termination of the employment of the 2nd and 4th Claimants unfair within the meaning Section 45 of the Employment Act.

Remedies

25. Flowing from the foregoing findings, I award the 1st, 2nd and 4th Claimants three (3) months’ salary in compensation. In arriving at this award, I have taken into account the Claimants’ length of service as well as the Respondent’s failure to comply with the law in effecting the terminations. I further award the 1st, 2nd and 4th Claimants one (1) month’s salary in lieu of notice.

26. As regards, the 3rd Claimant it would appear that his contract of employment came to an end by effluxion of time. At any rate, he made no claim for unfair termination, his only claims being balance of payment on account of some wiring contract and prorata leave pay for 8 months.

27. On the claim for balance of payment on the wiring contract which emanates from an extra employment engagement, the only thing to say is that such a claim would be commercial in nature and therefore beyond the jurisdiction of this Court.

28. No basis was laid for the claims for prorata leave pay, unpaid salary and remainder of contract which therefore fail and are dismissed.

29. In the end, I enter judgment in favour of the 1st, 2nd and 4th Claimants as follows:

1st Claimant: Makokha Barasa Aggrey

- a. 3 months’ salary in compensation.....Kshs. 172,000
- b. 1 month’s salary in lieu of notice.....57,500
- Total.....230,000**

2nd Claimant: James Mwabili Mnyika

- a. 3 months’ salary in compensationKshs. 84,000
- b. 1 month’s salary in lieu of notice.....28,000

Total.....112,000

4th Claimant: David Maingi Joseph

a. 3 months' salary in compensation.....Kshs. 51,900

b. 1 month's salary in lieu of notice.....17,300

Total.....69,200

30. The award amounts will attract interest at court rates from the date of judgment until payment in full.

31. As the claimants claim succeeds only in part, I direct that each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Ngonze for the Claimant

Mr. Onyango for the Respondent