



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 367 OF 2011

PETER NGIGI KARANJA.....1st CLAIMANT

PETER MBIYU NJENGA KIBUNJA.....2nd CLAIMANT

PETER SAMUEL KISIAH.....3rd CLAIMANT

BONIFACE MUTHOGA MWANGI.....4th CLAIMANT

STEPHEN NZUMA KILONZO.....5th CLAIMANT

THOMAS MATELI.....6th CLAIMANT

HUMPHREY THIAKA BUNDI.....7th CLAIMANT

NEHEMIAH RAPHAEL ARUNGA.....8th CLAIMANT

NELSON PETER MUTHUO.....9th CLAIMANT

STANLEY NJIRU MWANGI.....10th CLAIMANT

THOMAS MUTUNE KATIKU.....11th CLAIMANT

MATHEW ONDULA ABONYO.....12th CLAIMANT

BENSON KIMATA KAMAU.....13th CLAIMANT

BENARD ODHIAMBO OMONDI.....14th CLAIMANT

LEONARD JUMA CAPTAIN.....15th CLAIMANT

IRERI JOEL RUTERE.....16th CLAIMANT

MUTUNE SAMMY MUSEMBI.....17th CLAIMANT

PETER NJOROGE UCU.....18th CLAIMANT

OCHIENG NASHON OMOLO.....19th CLAIMANT

DAVID NDUNGU NDONYE.....20th CLAIMANT

JUSTUS MWENDWA MUSAU.....21st CLAIMANT

JOSEPH MAINA MWANIKI.....22nd CLAIMANT

JUDGMENT

1. Either through design or otherwise, the parties pleadings herein were convoluted. The Claimants even had different advocates acting on their behalf at the same time with the probability of conflicting positions being advanced.
2. The Claimants instituted proceedings against the Respondent on 14 March 2011 and they stated the Issues in Dispute as
 1. Threatened dismissal
 2. Unlawful lockout
 3. Withholding of salary.
3. The Memorandum of Claim was accompanied by a motion under certificate of urgency seeking interim injunction restraining the Respondent from implementing a decision to dismiss the Claimants.
4. When the motion was placed before the Court on the same day, the Court directed that it be served for *inter partes hearing* on 31 March 2011.
5. The Respondent filed a response to the application on 31 March 2011 and the hearing there're aborted.
6. On 15 June 2011, the Claimants withdrew the application on the ground that it had been overtaken by events.
7. On the same date, the Court granted leave to the Claimants to file an *Amended Memorandum of Claim* within 14 days.
8. The Respondent was also granted leave to file an *Amended Response* (the parties did not comply) as they told the Court they were attempting out of court settlement.
9. On 10 December 2012, the Claimants again sought for leave to amend the Memorandum of Claim.
10. The Court directed them to file an *Amended Memorandum of Claim* before 15 January 2013 but the same was only filed on 25 January 2013.
11. The Respondent was also granted liberty to amend its Response. Hearing was fixed for 11 February 2013.
12. On the hearing date, the Claimants again sought leave to amend.
13. The Respondent filed an *Amended Response* on 28 March 2013 and the Claimants filed list of witnesses and documents on 11 July 2013.
14. On 12 May 2014, the Court directed the Claimants to file all their evidence and Agreed Issues.
15. The Agreed Issues were not filed, and on 21 July 2014 the Court directed the parties to comply ahead of hearing.
16. On 17 March 2014, the Respondent filed an *Amended Response and Counterclaim*, documents and witness statements.
17. On 23 April 2015, the Court directed the parties to file witness statements within 14 days.
18. The Respondent filed a witness statements on 27 May 2015, the day that hearing commenced with the 4th Claimant taking to the stand.
19. 20th Claimant testified on 9 July 2015 on which date the Court was informed that the claims by the 1st and 2nd Claimants were being discontinued.
20. On 23 July 2015, the Respondent applied to have all the Claimants testify and be cross examined, and the Court directed that the parties identify the witnesses to testify in order to save the Court's time.
21. Other witness statement and documents were filed on 11 August 2015.
22. On 7 October 2015, the Court directed that the 6 Claimants who had been identified by the Respondent be called to testify.

23. On 2 November 2017, the Court fixed the Cause for further hearing on 10 January 2018 and 11 January 2018.
24. The Claimant was directed to file witness statements within a month.
25. Unfortunately, the trial Judge was transferred and when the file was placed before me on 18 May 2018, the Claimants sought for leave to amend the Memorandum of Claim, an application the Court allowed.
26. The Respondent was given liberty to file an Amended Response if necessary. An *Amended Memorandum of Claim* was filed on 17 May 2018 while the Respondent filed an *Amended Response* on 25 June 2018.
27. The hearing resumed before this Court on 27 June 2018 with the 3rd Claimant taking to the stand.
28. The 12th Claimant testified on 30 October 2018 while the Respondent's 2 witnesses (its Chief Information Officer and Human Resources Officer) testified on 6 December 2018.
29. The Claimants filed their submissions on 31 December 2018 while the Respondent did not file any submissions.
30. The Court has considered the pleadings, evidence and submissions and condensed the Issues for Determination into,
 - (i) Whether the termination of the Claimants' contracts were unfair
 - (ii) Whether there was breach of contract
 - (iii) Whether the Claimants' are liable in restitution to the Respondent and
 - (iv) Appropriate remedies.

Unfair termination of employment

Procedural fairness

31. Unless it is a case of summary dismissal, section 35(1)(c) of the Employment Act, 2007 obligates an employer to issue a *written notice of termination* to an employee before termination of contract.
32. The written notice may be loosely referred to as a *show cause* and it may serve as a trigger of the disciplinary hearing contemplated by section 41 of the Act.
33. Around 2 February 2011, the Claimants were arrested by the Police and the next day, they were charged before the Kiambu Magistrates Court. They were released on bond.
34. The Respondent issued *show causes* to the Claimants on 18 February 2011 calling upon them to respond to allegations of manipulation of time and attendance reports and fraudulent receipt of overtime payments.
35. The Claimants were requested to make representations within 10 days of the letter.
36. The Claimants in their witness statements admitted receiving copies of the *show cause notices*, and that their advocate wrote to the Respondent on 9 February 2011.
37. On 15 March 2011 (dated 2012?), the Respondent issued letters to the Claimants notifying them that their contracts had been terminated on account of failing to respond to the show cause notices, and for absconding from work.
38. In so far as the Respondent notified the Claimants that the termination of their contracts were on the cards on allegations of manipulation of time and attendance records and fraudulent receipt of overtime payments and gave them the opportunity to make representations which they rebuffed, the Court is satisfied that the Respondent was in substantial compliance with the requirements of sections 35(1) and 41 of the Employment Act, 2007.
39. However, on the allegations of absconding from duty, the Court is of the view that because the Claimants were not called upon to explain why they were not reporting to work, the termination on that account did not meet procedural fairness muster.
40. It is not lost to the Court that the Claimants testimony that they were not allowed into the workplace after the arrest and charging before the Courts was not rebutted by the Respondent's witnesses.

Substantive fairness

41. Unlike the regime under the Evidence Act, which stipulates that he who asserts must prove, in unfair termination of contract disputes, sections 43 and 45 of the Employment Act, 2007 have placed upon the employer the burden of proving the reasons for termination of

employment, and that the reasons are valid and fair.

42. The Respondent's witnesses testified that a payroll officer Peter Kibunja overrode the automatic time and attendance system by inputting overtime work for employees who did not work overtime and that the employees thus got paid for overtime not worked.

43. As an illustration, the witnesses drew the attention of the Court to 2 employees who were paid overtime even for a period they were on leave/absent.

44. The witnesses also admitted that though the Claimants did not have access rights to manipulate the system, an audit established that they were beneficiaries of fraudulent overtime payments.

45. The Respondent also filed statements some of the Claimants recorded with the Police.

46. In the statements, there are admissions by the Claimants that they used to share the fraudulent overtime payments with Peter Kibunja (each employee was parting with about Kshs 5,000/-).

47. It is also clear from the statements recorded with the Police that the Claimants were aware of the *excess overtime* payments.

48. Although the Claimants did not have access to the system, there is sufficient evidence that they were privy to the manipulation of the system and that they shared the proceeds of the fraud with the mastermind, Peter Kibunja.

49. The Court is satisfied that the Respondent has established that it had valid and fair reasons to terminate the employment of the Claimants.

Breach of contract

50. The Claimants advanced claims in respect of overtime pay and accrued leave by time of separation.

51. All employees are entitled by law to annual leave and payment for all overtime work done.

52. The Respondent filed records indicating the leave balances of each of the Claimant, and the Court has no reason to disbelieve the authenticity of the records.

53. The Claimants were paid for overtime through the automated system and the Court is bothered that they still presented claims for overtime spreading even to 17 years.

54. In the view of the Court, these claims for overtime were not only an afterthought but if genuine would be caught up by the law of limitation.

Severance pay

55. In terms of the Employment Act, 2007, severance pay is benefit accruing to an employee whose position has been declared redundant.

56. The separation under challenge in the instant Cause were not through redundancies, and therefore the Respondent was not in breach of statute or contract by declining to pay the same.

Salaries for February and March 2011

57. The termination of the Claimants' contracts was communicated through letters dated 15 March 2011, but effectively the Claimants did not report to work after their arrests on 2 February 2011.

58. The Court therefore sees no legitimate reasons to order for payment of salaries which were not earned.

Pay in lieu of notice

59. Having reached the conclusion that the termination of the Claimants' contracts were procedurally and substantively fair, pay in lieu of notice is not available.

Compensation

60. It must be obvious by now that the Claimants are not entitled to compensation, which in any case is a discretionary remedy where there is a finding of unfairness.

Counterclaim/Restitution

61. The Respondent counterclaimed against the Claimants for the fraudulent overtime payments.

62. Legally, such payments can be recovered under a cause of action for unjust enrichment, previously called *money had and received*.

63. In this case, apart from drawing the attention of the Court to the schedule of fraudulent payments, the Respondent's witnesses did not lay a sufficient foundation for the grant of the relief sought, being in the nature of special damages.

64. The heads of claim were not proved to the required standard.

Conclusion and Orders

65. The Court finds and holds that the termination of the contracts of the Claimants were fair, procedurally and substantively.

66. The Amended Memorandum of Claim is thus dismissed with no order to costs.

67. The Court also finds and holds that the counterclaim was not proved, and the same is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimants Mr. Enonda instructed by Enonda & Associates Advocates

For 6th & 20th Claimants Odero Osiemo & Co. Advocates

For Respondent Mrs. Omondi instructed by Oraro & Co. Advocates

Court Assistants Lindsey