



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1017 OF 2014

JAMES OTIENO.....1ST CLAIMANT

WILFRED NUNU.....2ND CLAIMANT

MICHAEL OTIENO.....3RD CLAIMANT

EZEKIEL OTIENO.....4TH CLAIMANT

MOSES OTIENO.....5TH CLAIMANT

VS

SPRING FASHION (AFRICA) INTERNATIONAL

COMPANY LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants’ claim brought by Memorandum of Claim dated 18th June 2014 and amended on 25th June 2014 is for unlawful redundancy. The Respondent filed a Response on 22nd July 2014.

2. When the parties appeared before me on 19th October 2018, they elected to dispense with the claim by way of written submissions. The Claimants filed their submissions on 29th October 2018. The Respondent did not file any submissions.

The Claimants’ Case

3. The Claimants state that they were orally employed by the Respondent on diverse dates between 15th June 2009 and 18th September 2013. They were employed in the positions of Storekeeper and their monthly salaries ranged from Kshs 13,000 to 17,000.

4. The Claimants claim that throughout their employment, they were not paid house allowance. Further, the Respondent did not remit their National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues. Additionally, the Claimants state that they worked extra hours without overtime compensation.

5. On 22nd April 2014 the Respondent terminated the Claimants’ employment, stating that there was no material for work. The Claimants were therefore declared redundant. They claim that the termination was unlawful and unfair in that there was no prior notice of an intended redundancy and they were not paid their final dues.They therefore claim the following:

1st Claimant: James Otieno

- a) One month’s salary in lieu of notice.....Kshs. 13,000.00
- b) Service.....30,000.00
- c) House allowance for 4 years.....93,600.00

d) Public holidays.....	32,000.00
e) Overtime.....	255,999.90
f) Full compensation for wrongful loss of employment.....	156,000.00
g) NHIF for 4 years.....	15,360.00

2nd Claimant: Wilfred Nunu

a) One month's salary in lieu of notice.....	Kshs. 13,000.00
b) Service.....	7,520.00
c) House allowance.....	15,000.00
d) Public holidays.....	8,000.00
e) Overtime.....	82,944.00
f) Full compensation for wrongful loss of employment.....	156,000.00
g) NHIF.....	2,560.00

3rd Claimant: Michael Otieno

a) One month's salary in lieu of notice.....	Kshs. 16,000.00
b) Service.....	36,918.00
c) House allowance.....	115,200.00
d) Public holidays.....	39,360.00
e) Overtime.....	331,776.00
f) Full compensation for wrongful loss of employment.....	192,000.00
g) NHIF.....	15,360.00

4th Claimant: Moses Otieno

a) One month's salary in lieu of notice.....	Kshs. 16,000.00
b) Service/NSSF.....	18,461.50
c) House allowance.....	57,600.00
d) Public holidays.....	19,692.30
e) Overtime.....	41,472.00
f) Full compensation for wrongful loss of employment.....	192,000.00
g) NHIF.....	7,680.00

5th Claimant: Ezekiel Otieno

a) One month's salary in lieu of notice.....	Kshs. 17,000.00
b) Service/NSSF.....	72,975.50
c) House allowance.....	153,000.00

- d) Overtime.....414,720.00
- e) Full compensation for wrongful loss of employment.....204,000.00
- f) NHIF.....19,200.00

6. The Claimants also ask for certificates of service, costs plus interest

The Respondent's Case

7. In its Response dated 21st July 2014 and filed in court on 22nd July 2014, the Respondent states that the 1st Claimant was employed as a cleaner while the 2nd, 3rd and 4th Claimants were employed as shop assistants. The Respondent adds that at the time of termination, the 2nd Claimant was on probation.

8. The Respondent further states that the Claimants were paid consolidated salaries inclusive of house allowance.

9. While denying the claims for unlawful and unfair termination, the Respondent states that the Claimants were summarily dismissed for gross misconduct particulars being:

- a) Absenting themselves from their respective places of work;
- b) Wilfully neglecting to perform their respective duties;
- c) Refusing to obey lawful command issued by their supervisor.

10. The Respondent therefore asserts that the Claimants' dismissal was justified.

11. The Respondent denies that the Claimants worked extra hours as pleaded in the Memorandum of Claim.

Findings and Determination

12. 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

13. The Claimants plead that their employment was terminated on account of redundancy but add that the Respondent failed to comply with Section 40 of the Employment Act, 2007 which sets the conditions to be applied in this form of termination. On its part, the Respondent states that the Claimants were summarily dismissed for gross misconduct.

14. None of the parties called any evidence to support their account on the circumstances leading to the cessation of the employment relationship. It is however evident that the Claimants were not subjected to any procedure prior to the termination. The Court could not therefore tell the reason for the termination thus rendering it substantively and procedurally unfair.

Remedies

15. In light of the foregoing findings, the Claimants are entitled to compensation. In this regard, I award the 1st and 4th Claimants ten (10) months' salary, the 2nd and 3rd Claimants three (3) months' salary and the 5th Claimant four (4) months' salary.

16. In arriving at these awards, I have taken into account the Claimants' respective periods of service as well as the Respondent's conduct in the termination transaction. I further award each Claimant one (1) month's salary in lieu of notice.

17. The Claimants also claim house allowance. Section 31(1)and(2) of the Employment Act provides that:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an

element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

18. The Employment Act places the responsibility of documenting the terms and conditions of employment on the shoulders of the employer and as held in ***Robai Musinzi v Safdar Mohamed Khan [2012] eKLR*** where an employer fails to discharge this mandate, it is left to the Court to interpret these terms.

19. There was no evidence presented before the Court to demonstrate any intention that the monthly salaries paid to the Claimants were inclusive of house allowance. Consequently, I allow the claims for house allowance at 15% of the respective basic salaries and adopt the resultant figures as the Claimants' monthly salaries for purposes of this claim.

20. In the absence of documentary proof that the Claimants were contributing members of NSSF, the claims for service pay must succeed.

21. With regard to the Respondent's averment that the 2nd Claimant was on probation at the time of termination I have this to say; the law requires that probationary contracts be expressed in writing. In the absence of any such contract, the Respondent's averment in this regard was unsupported and is rejected.

22. The claims for public holidays and overtime were not proved and are dismissed. Any NHIF dues would be due to the statutory body and not the Claimants. The claim thereon is therefore without basis and is dismissed

23. In the end I enter judgment in favour of the Claimants as follows:

1st Claimant: James Otieno

a) 10 months' salary in compensation.....	Kshs. 149,500
b) One month's salary in lieu of notice.....	14,950
c) House allowance for 55 months.....	107,250
d) Service pay for 4 years (14,950/30x15x4).....	<u>29,900</u>
Total.....	301,600

2nd Claimant: Wilfred Nunu

a) 3 months' salary in compensation.....	Kshs. 44,850
b) One month's salary in lieu of notice.....	14,950
c) House allowance for 7 months.....	<u>13,650</u>
Total.....	73,450

3rd Claimant: Michael Otieno

a) 3 months' salary in compensation.....	Kshs. 55,200
b) One month's salary in lieu of notice.....	18,400
c) House allowance for 15 months.....	36,000
d) Service pay for 1 year (18,400/30x15x1).....	<u>9,200</u>
Total.....	118,800

4th Claimant: Moses Otieno

a) 10 months' salary in compensation.....	Kshs. 184,000
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b) One month's salary in lieu of notice.....	18,400
c) House allowance for 58 months.....	139,200
d) Service pay for 4 years (18,400/30x15x4).....	<u>36,800</u>
Total.....	387,400

5th Claimant: Ezekiel Otieno

a) 4 months' salary in compensation.....	Kshs. 78,200
b) One month's salary in lieu of notice.....	19,550
c) House allowance for 26 months.....	66,300
d) Service pay for 2 years (19,550/30x15x2).....	<u>19,550</u>
Total.....	183,600

24. These amounts will attract interest at court rates from the date of delivery of this judgment until payment in full.

25. The Claimants are also entitled to certificates of service plus the costs of the case.

DATED AND SIGNED AT MOMBASA THIS 15TH DAY OF JANUARY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Mageto for the Claimants

Mr. Muriungi h/b Miss Karumba for the Respondent