



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2025 OF 2014 CONSOLIDATED WITH CAUSES 2027, 2028, 2029, AND 2030 ALL OF 2014**

**ROBA JILLO GALGALO.....1<sup>ST</sup> CLAIMANT**

**QALLA GUYO JILLO.....2<sup>ND</sup> CLAIMANT**

**HASSAN GABABA BORA.....3<sup>RD</sup> CLAIMANT**

**WARIO GABABA BORA.....4<sup>TH</sup> CLAIMANT**

**DIBA SORA DIDO.....5<sup>TH</sup> CLAIMANT**

**- VERSUS -**

**TROCAIRE..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> March, 2019)

**JUDGMENT**

The claimants filed on 20.11.2014 their respective memoranda of claims against their former employer Trocaire. They were represented by Rahma Jillo & Company Advocates. They made claims against the respondent as computed in the memoranda of claims and on the headings of the declaration that each suffered an unfair termination by way of redundancy; compensation equivalent of 12 months' salaries; unpaid overtime; unpaid house allowance; transport to and from work; remuneration for extra duties assigned; employment benefits for period served as causal employees; interest; and costs of the suit.

The claimants stated that they were employed on diverse dates by the respondent thus the 1<sup>st</sup> claimant on 16.03.2001; the 2<sup>nd</sup> claimant on 05.05.2005; the 3<sup>rd</sup> claimant on 01.07.1994; 27.11.1992; and the 5<sup>th</sup> claimant on 15.10.2005. The claimants further pleaded that on 01.11.2013 each was subjected to an unfair and unlawful redundancy marred with victimisation and discrimination on grounds of ethnicity, religion, and for demanding overtime. In particular they allege that the redundancy was driven by the fact that the claimants were Muslims and of Somali origin. Consequential to the redundancy, they stated that terminal dues were not paid per the Employment Act, 2007. Further, each was not paid house allowance, overtime and for extra duties throughout the service and as per the Regulation of Wages (Protective Security Services) Order 1998.

The respondent filed its response to each of the memoranda of claims on 22.09.2015 and through Iseme, Kamau, & Maema Advocates. The respondent prayed that the respective claims be dismissed with costs. The respondent further pleaded and alleged as follows:

1. It employed the claimants and the existence of the contract of service was not denied.
2. There was no abrupt loss of employment but that the redundancy notice was served; the respondent undertook a training of the affected security officers on management of change, their financial resources and looking at future employment opportunities; there was no illegality or unlawfulness in the redundancy process; and the redundancy affected all security officers and there was no victimization on all the grounds as alleged for the claimants.
3. The claimants' salary was consolidated and the claim for house allowance is misplaced.
4. The claim for transport allowance had no contractual or statutory basis.

In particular, the respondent pleaded as follows on the redundancy process:

1. On 30.10.2013 the requisite notice to the Nairobi County Labour Officer on intended redundancy was issued.
2. On 01.11.2013 all the claimants were served with redundancy notices setting out the details of severance pay.
3. On 18.12.2013 the claimants signed unconditional release letters discharging the respondent from further liability.
4. By the letter of 01.11.2013 the Nairobi Labour Officer confirmed that redundancy was in accordance with the provisions of the law and severance package was above the statutory threshold.

The Court has considered the pleadings, the evidence and submissions on record and returns as follows.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the claims for pay for extra duties, house allowance, underpayment, transport allowance and overtime were all in the nature of continuing injuries. Under section 90 of the Employment Act, 2007 the period of limitation for such cause of action is 12 months from the date of cessation thereof. The injuries as claimed ceased on the date of redundancy on 01.11.2013 and the suits were filed on 20.11.2014. The 12 months lapsed on or about 01.11.2014 and the Court returns that the claims and prayers were time barred under the section. They are declined. In any event CW1 confirmed that he was paid overtime whenever he was called from off to work as a reliever or on public holidays. CW1 also confirmed that the written contract of service provided for hours of work as 6am to 6pm and the same was adhered to and the agreed salary was paid. The listed duties were security of premises, checking all visitors to the premises, care of the compound, and any other tasks which the respondent may reasonably request during the period of employment. The Court returns that the cleaning assignments were not extra but were agreed upon by the claimants and the respondent for the pay and hours of work in the contract. The contractual provision was that claimants would meet their own transport costs to and from work. The Court finds that parties acted within the contract of service and the claims were unjustified as they were time barred.

RW testified that after the letter withdrawing redundancy the claimants came for a meeting and rejected the withdrawal as they said they wanted to go on redundancy. RW stated that the withdrawal had been due to their failure to accept the notice of redundancy. To confirm the acceptance of the redundancy, RW testified that the claimants accepted the redundancy notice and the arrangements to pay stipulated dues as was conveyed. RW further stated that the claimants declined the offer to work for the company the respondent had outsourced to offer the security services. He further testified that redundancy had been due to financial constraints leading to downsizing.

The Court has considered the evidence. It is clear that the withdrawal notice was dated 19.12.2013 and redundancy notice had been dated 01.11.2013. As at the time of withdrawal of the redundancy notice, the Court considers that the statutory one month notice had lapsed on or about 01.12.2013 so that despite the withdrawal, the period for the statutory notice had in any event been served. In any further event, and as submitted for the respondent, the parties thereafter must have agreed to go on with the redundancy and their intentions and actions must be respected by the Court. There was no dispute that the redundancy package was paid as proposed by the respondent and the claimants accepted the pay so that each signed the unconditional release letter discharging the respondent from liability. The Court returns that the respondent has established a genuine reason for redundancy as per section 43 of the Act namely that the respondent had financial difficulties necessitating downsizing including abolishing the security department as manifested in the outsourcing arrangements. The Court returns that by accepting the redundancy package and other dues and signing that each claimant had no further claims against the respondent, and by the respondent paying accordingly, the purported withdrawal was thereby waived by the parties' own mutual conduct and intentions. The respondent served upon the claimants and the area labour officer the notices as prescribed in section 40 of the Act. Thus the Court returns that the termination by way of redundancy was not unfair both in substance and procedure. The claim for 12 months' salaries in compensation for unfair termination will therefore fail.

The **2<sup>nd</sup> issue** for determination is whether the redundancy was lawful or it amounted to unfair termination. CW1 testified that the claimants received the redundancy notice dated 01.11.2013. The notice stated that effective 01.01.2014 the offices held by the claimants would be abolished and the letter served two months of termination of services on account of redundancy. The letter set out the redundancy and terminal dues as follows:

1. In late December 2013 payment of 3 months' salaries including salary for December 2013; a 13<sup>th</sup> salary for 2013; and one month salary paid on ex gratia basis.
2. Severance pay at one month's gross salary for each completed year of service.
3. A certificate of service to issue.
4. Pay in lieu of outstanding leave.
5. Payment of pension per applicable regulations
6. 2 months' written notice was being served.

The notice informed the claimants that the respondent, in the spirit of good human resource practices, would organise training on how to manage changes effectively. The claimants were paid the dues as promised.

CW1 testified that the redundancy notice was withdrawn by the letter dated 19.12.2013 signed by Paul Healy, Kenya Programme Country Director. The letter stated that the withdrawal was due to the claimants' failure to acknowledge receipt and acceptance of the redundancy terms. By the letter dated 16.12.2013 each claimant was told to proceed on leave from 17.12.2013 to 31.12.2013. The letter set out the due leave days to be paid together with the redundancy package. The respondent's letter dated 23.12.2013 repeated the withdrawal of the redundancy notice as per the letter dated 19.12.2013 and conveyed that the claimants were expected at work on 02.12.2013. The Court

returns that the termination was not unfair as the reason was genuine and the procedure in section 40 of the Act was substantially complied with.

To answer the **3<sup>rd</sup> issue** for determination the Court returns that the claimants have not established the claim for payment of benefits for the period served as casuals. As submitted for the respondent, the amount claimed was not particularised and being a claim for liquidated damages, the same was not properly pleaded and was not strictly proved. The prayer will therefore fail.

To answer the **4<sup>th</sup> issue** for determination the Court returns that each party shall bear own costs of the suit. The Court has particularly considered the letter of 19.12.2013 purportedly withdrawing the redundancy notice and by which the claimants may have misdirected themselves to think that they had a claim for unfair termination on account of redundancy.

In conclusion the claimants' respective suits are hereby dismissed with costs.

**Signed, dated and delivered in court at Nairobi this Friday 22<sup>nd</sup> March, 2019.**

**BYRAM ONGAYA**

**JUDGE**