



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2400 OF 2012

JACKSON MUGOLIO MUSUNJI.....CLAIMANT

VERSUS

DAMBUSTERS EAST AFRICA LIMITED....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 2467 OF 2012

SCHOLASTICA WANGARE.....CLAIMANT

VERSUS

DAMBUSTERS EAST AFRICA LIMITED....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 2468 OF 2012

JUDITH NTHOKI NDUVA.....CLAIMANT

VERSUS

DAMBUSTERS EAST AFRICA LIMITED...RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 2033 OF 2012

EVANS MORARA NYANTIKA.....CLAIMANT

VERSUS

DAMBUSTERS EAST AFRICA LIMITED.....RESPONDENT

*(Before Hon. Lady Justice Maureen Onyango)*

**JUDGMENT**

The Claimants Evans Morara Nyantika, Jackson Mugolio Musunji, Scholastica Wangare and Judith Nthoki Nduva filed this suit seeking damages for unlawful termination and payment of terminal dues against the respondent. They were employed on diverse dates and aver that they worked for the respondent diligently without off or leave days until they were terminated on 14<sup>th</sup> May 2012, when they were summoned by the manager who informed them that the services of the employees who had worked over 5 years were no longer required.

They served the Respondent in the following capacities

Name	Date of employment	Position	Salary (Kshs.)	Claim
Judith Nduva	Nthoki 22 <sup>nd</sup> March, 1996	Cook	17,250.00	House allowance, 178 public holidays, 12 months salary compensation, severance pay, 16 days annual leave.

Jackson Mugolo Musunji	5 <sup>th</sup> May, 1998	Cleaner	15,000.00	House allowance for 156 months, one month's pay in lieu of notice, 12 months salary compensation, severance pay for 13 years, 13 days annual leave.
Evans Morara Nyantika	1 <sup>st</sup> January, 2003	Waiter	13,481.45	Underpayments of salary, salary for 14 days worked in May, 2012, two month's salary in lieu of notice, severance pay for 9 years, 12 months salary compensation.
Scholastica Wangare	April, 2009	Waitress	10,000.00	House allowance, 1 month's salary in lieu of notice, 36 public holidays, 3 days balance of unpaid leave, 12 months' salary compensation, severance for 2 years.

That they were not given any reason for termination, they were not given notice and neither were they given a chance to be heard. They urge the Court to allow their respective claims.

The respondent filed a memorandum of reply wherein it denies the employment relationship and states that the Claimants were employed by another entity which should be held liable for the claim. The respondent further states that if at all there was an employment relationship the same ended procedurally and all terminal dues were paid through on M/s A. O Jacob of Kenya Labour Consultants.

### Submissions

The matter proceeded by way of written submissions. It is submitted on behalf of the Claimants that the instant case is a classic case of redundancy and the Respondent did not comply with the mandatory requirements under Section 40 of the Employment Act. Further that the Respondent has not tabled any evidence to prove that it adhered to the prevailing minimum wages as pleaded by the Claimants. That the Claimants were unfairly terminated and thus entitled to the prayers sought.

The Respondent on the other hand submits that the Claimants could not have possibly been employed by the Respondent at the times they claim to have been so employed as it did not exist as a legal entity capable of suing or being sued in its name. That the grievances of the claimants ought to have been with the individuals or entities that had employed them.

That should the Court find that the Respondent was the Claimants' employer it should find that any purported relationship with the Respondent commenced after 1<sup>st</sup> April 2011, when the Respondent was incorporated.

Further that the Claimants have not established a case for unfair termination as in their pleadings and evidence they stated that they were summoned by the manager whose name is undisclosed. That the Claimants claim underpayments whereas they have not attached any payslips in support of such allegations and therefore any claim based on salary should fail. That the Respondent did remit monies due to the Claimants for the one year that they were in its employment to their representative and as such the claim for further terminal dues that remain unpaid and underpayments have not been established and such claims should fail. It is submitted on behalf of the Respondent that the suit be dismissed for want of merit.

### Determination

Having considered the pleadings, witness statements and the parties respective submissions the issues for determination are:

1. Whether there existed an employment relationship between the claimants and the respondents
2. Whether the Claimants were unfairly terminated
3. Whether the Claimants are entitled to the prayers sought.

Section 2 of the Employment Act defines "*contract of service*" and "*employee*" as follows:

***"contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies."***

***"employee" means a person employed for wages or salary and includes an apprentice and indenture learner."***

The Claimants in their pleadings have pleaded different dates of employment by the Respondent but the Respondent denies any such relationship. The certificate of incorporation in the defendants bundle of documents indicates 1<sup>st</sup> April, 2011, as the date of incorporation. The dates of employment pleaded are prior to the said 1<sup>st</sup> April 2011. This is supported by the Respondent's communication with the Claimants labour representative one Jacob Kadee with whom the Respondent settled the claimants terminal benefits.

As to whether the Claimants were unfairly terminated the Claimants submit that they were summoned to the manager's office and informed that their services were no longer required. The Respondent on the other hand submits that they mutually parted ways with the Claimants.

An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. In the instant case the Respondent admits employment but has not demonstrated the reasons

for separation. No documentation was provided as proof of reason for termination and the procedure followed.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

*“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

Furthermore, according to Section 74 of the Employment Act it is the duty of the employer to keep records of all its employees including the period for which employment is expected to continue where employment is not intended to be for an indefinite period as provided in Section 10(3)(c). It was therefore the responsibility of the Respondent to produce such records to prove the said mutual separation. Failure by the Respondent to produce such records shifts the burden of disproving allegations of the claimants to the respondent as provided in Section 10(6) and (7) which provide that–

**(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.**

**(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.**

From the evidence on record, it appears as if the claimants were employed by an entity that has metamorphosed over the years using different names such as Dambusters Restaurant, Dambusters 77 Limited, Dambusters Club and finally, Dambusters East Africa Limited, the name of the entity that has been sued herein. The respondent submitted in its bundle of documents a request for registration with NSSF for Judith Nthoki Nduva under the name Dambusters Restaurant, in October 1998. The stamp on the letter is however that of Dambusters Club. As stated by the claimant, they were employed in the same premises by the same employer and were oblivious of the changes in the name. Evans Morara Nyantika states he was employed 2003, Jackson Mugolio Musunji, in 1998, scholastic Wangare in 2009 and Judith Nthoki Nduva in 1996.

The respondent has not specifically denied these averments, only stating that since the entity in the name in the suit was incorporated on 1<sup>st</sup> April 2011, it can only accept liability from that date. It has not explained the change in names over the period, only stating that the limited liability company did not take over any liabilities. It has not demonstrated that when it was taking over the workers were made aware that it would not assume liability from their previous employment. In the witness statement of Peter Kimani he states that the claimants had been employed by Dambusters (77) Limited and the respondent did not take over any assets or liabilities. The respondent's averments are not supported by any evidence.

The Employment Act has a very liberal definition of “employer” to mean –

**“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;**

When an employee is working in the same premises for the same employer, it is not affected by change of name unless this has been brought to his attention and the entity taking over has cleared the issue of employment benefits and or continuity of service. It would otherwise be unfair labour practice as the employer would be treating employees as other inanimate assets thus subjecting them to unfair labour practice.

For these reasons, I hold the respondent as sued, to be liable for the entire period of employment of the claimants, as it has not demonstrated that it did not take over the liability for the same from its predecessor in name.

The claimants aver that they were called and informed that their work was over. The respondent on the other hand states the termination was mutual, without submitting any proof of the same, save for agreements signed with A. O. Jacob, but without establishing a nexus between the said A. O. Jacob and the claimants.

Having not submitted records of the mutual separation, I find that the termination was unfair in terms of Section 45(2) and (4) of the Employment Act. I however find no proof or redundancy as submitted for the claimants.

## **Remedies**

The Claimants claim underpayments, severance pay, leave days not taken, public holidays worked, house allowance and salary for days worked in the month of May. The Respondent has attached payment vouchers and a cheque forwarded to the labour representative in settlement of their terminal dues. The claims as tabulated in the respective memorandums of claim fail, as the claimants have not proved the same. I also do not find any evidence of redundancy.

Having found the termination unfair and taking into account the length of service of the claimants, I award each of them 12 months' salary as compensation

Under paragraph 20 of the Regulation of Wages (Hotel and Catering Trades) Order, the employees in the industry are entitled to three months' notice after working for over 10 years, 2 months' notice after working for 5 to 10 years and one month's notice before up to 5 years' service. The claimants are therefore entitled to notice as follows –

Judith – 3 months

Evans – 2 months

Jackson – 3 months

Scholastica – 1 month

The Hotel and Catering Trades Orders also provides for gratuity at the rate of 15 days' pay for every completed year of service. However this was not prayed for by the claimants.

I therefore award each of them the following –

**1. Judith Nthoki Nduva**

Salary = Kshs.15,000

12 months' compensation – Kshs.180,000

3 months' notice – Kshs.45,000

**Total = Kshs.225,000.00**

**2. Evans Moraa Nyantike**

Salary = Kshs.22,264.55

12 months' compensation – Kshs.267,174.60

2 months' notice – Kshs.66,793.65

**Total = Kshs. 333,968.25**

**3. Jackson Mugulio Musunji**

Salary = Kshs.17,250

12 months' compensation – Kshs.207,000

3 months' notice – Kshs.51,750

**Total = Kshs.258,750.00**

**4. Scholastica Wangare**

Salary = Kshs.17,250

12 months' compensation – Kshs.207,000

1 month's notice – Kshs.17,250

**Total = Kshs.224,250.00**

The respondent shall pay claimants' costs for the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**