



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1170 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th June, 2019)

WILBERFORCE SIFUNA.....CLAIMANT

VERSUS

BURHANI ENGINEERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

ELRC CAUSE NO. 1168 OF 2015

JOHN KAMAU.....CLAIMANT

VERSUS

BURHANI ENGINEERS LIMITED.....RESPONDENT

-AND-

ELRC CAUSE NO. 1169 OF 2015

JAMES GITHENYA.....CLAIMANT

VERSUS

BURHANI ENGINEERS LIMITED.....RESPONDENT

-AND-

ELRC CAUSE NO. 1171 OF 2015

MARTIN MAINA.....CLAIMANT

VERSUS

BURHANI ENGINEERS LIMITED.....RESPONDENT

-AND-

ELRC CAUSE NO. 1172 OF 2015

PETRONELLA NYABIOSI.....CLAIMANT

VERSUS

JUDGEMENT

1. The Claimants Wilberforce Sifuna, Martin Maina, John Kamau, James Githenya and Petronella Nyabosi filed their respective suits through the firm of Lesinko, Njoroge & Gathogo Advocates seeking damages for unlawful termination of employment and payment of their terminal benefits.

2. They aver that they were employed by the Respondent on diverse dates as follows:-

1. *Wilberforce Sifuna* - *31.1.2012 but worked as a casual from August 2011*
2. *Martin Maina* - *31.1.2012 but worked as a casual from August 2011*
3. *John Kamau* - *31.1.2012 but worked as a casual from August 2011*
4. *James Githenya* - *31.1.2012 but worked as a casual from August 2011*
5. *Petronella Nyabosi* - *31.1.2012 but worked as a casual from August 2011*

3. They aver that they worked for the Respondent in various capacities until 1st October 2014, when their services were terminated after asking for a salary increment.

4. They aver that they worked for the Respondent continuously for a period of 4 years when they sought audience with the Respondent with the view of having an upward review of salary which had remained unchanged from the date of employment. That employees who were employed subsequently were earning higher than them and in their view this amounted to discrimination.

5. The Claimants aver that they were unfairly treated by the Respondent as the Respondent purported to construe the grievance letter as a letter of resignation and proceeded to dismiss the Claimants from employment.

6. That the termination was unfair, irregular and unlawful for reasons that:-

- a. It was patently unfair for the Respondent to construe the claimant's letter as a resignation rather than addressing the grievance the Claimants had raised.*
- b. There was not a valid and justifiable reason for terminating the Claimants, employment.*
- c. Termination of the Claimants from employment was done in violation of the procedure provided for by the provisions of section 41(1) and (2) of the Employment Act.*
- d. The Claimants were not accorded an opportunity to air their grievances before termination of employment.*
- e. Termination as undertaken by the Respondent amounts to a gross violation of the right to fair labour practices.*
- f. No notice was given to the Claimant nor any payment in lieu of notice made by the Respondent before terminating their services.*
- g. The Respondent failed to issue the claimants with Certificates of Service consequent on termination of employment.*
- h. The Respondent failed to observe the minimum statutory safeguards requiring the payment of terminal benefits consequent upon termination of employment.*
- i. In all the circumstances of the matter, the respondent did not act with justice and equity in terminating the claimants' employment.*

7. That as a result of the Respondent's actions, they have suffered loss and injury, which the Respondent is bound to compensate them.
8. The Respondent filed a Memorandum of Reply and counterclaim wherein they admit the employment relationship as from 1.2.2012 but deny engaging them from August 2011 as casuals. That in any event even if the casual engagement is true, the same is irrelevant as the cause of action herein is based on the contract of employment.
9. The Respondent aver that the Claimants were sub-contracted as a result of a fixed term contract of Kshs. 54,734,922.00 dated 16.1.2012 between the Respondent and the United Nations for electrical maintenance. That the issue of salary increment had come up several times before to which the Respondent explained that it was not possible because the main contract was for a fixed term.
10. That the purported letter from the Claimants on salary increment was a threat and a very clear conditional letter of resignation. That the said letter was received on 29th September, 2014 which was a very short notice to elicit a response. That the Respondent accepted the Claimants' resignation after the Claimants failed to report to work on 1st October, 2014.
11. They further aver that the Claimants accepted the terms of employment offered by the Respondent and that the Claimant accepted those terms on their own behalf and not together with any person and they cannot therefore raise any other issues other than those directly relating to them.
12. The Respondent aver that they did not terminate the Claimants but that they voluntarily resigned and the Respondent accepted their resignation. They urge the Court to dismiss the Claim with costs.
13. The Respondent also filed a counter claim to the effect that as a result of the Claimants abandoning duty, they suffered loss as they abandoned duty without notice. That as result of the Claimants' actions United Nations deducted a sum of Kshs. 720,000/= from its monthly payment for underperformance. They seek a declaration that the Claimants unlawfully terminated their contracts of employment and as such seek notice pay from all the Claimants and damages for loss of profits goodwill.

Evidence

14. Wilberforce Sifuna testified on his own behalf and on behalf of his co-claimants and he admitted that they had been engaged following a contract between the Respondent and the United Nations and were terminated as set out in their pleadings. That on 1st October, 2014, they did not report to work as their gate passes had been taken away. He urged the Court to allow the Claims with costs.
15. The Respondent put up 2 witnesses Paul Kilonzo who led evidence to the effect that the Claimants were not dismissed from employment on 29.9.14 but that he received a letter from the Claimants who indicated that they were going to down their tools if the contracts were not reviewed.
16. On 1.10.2014, the Claimants' supervisor informed the Respondent that they had not reported to work and at that point, they decided to take the Claimants' threat seriously and accepted their resignation.
17. RW2 led evidence to the effect that the contract with the UN was a fixed term contract and the Claimant's salaries were calculated based on the contract sum. That they received complaints from the UN on the Claimant's absenteeism, which affected their performance and suffered losses.

Submissions

18. It is submitted on behalf of the Claimants that the words in the purported letter of termination were ambiguous and could not amount to a resignation as alleged by the Respondent. That this was the position in the case of **Nancy Jesany Sorgor Vs Kenya Women Finance Trust (2016)eKLR** where the Court held that the test for determining whether an employee had resigned or not is that an employee has to, either by word or conduct, show a clear and unambiguous intention not to go on with his contract of employment in that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract.
19. It is further submitted that the Claimants were unfairly terminated as there was no reason for termination and no procedure was followed as such the Court should allow their claims and award damages as provided under Section 49 of the Employment Act.
20. As to the counterclaims it is submitted that they did not abandon duty as alleged as they reported to work on 1st October, 2014, and found that their passes had been revoked and could as such not access their work stations. That the counterclaim is baseless and should be dismissed with costs.
21. The Respondent on the other hand submits that the Claimants letter showed a clear intention of their unwillingness to continue with their employment and it is on this basis that the Respondent treated the same as a resignation and accepted the conditional letters of pay increase as a resignation as well. That the Claimants were not unfairly terminated as they voluntarily resigned. They cite the case of **Mwikali Nzuki Vs Food for the Hungry Kenya (2015)eKLR** where it was held:-

“A resignation is voluntary if the employer does not influence or prompt the employee to resign. This is irrespective of whether the employee has committed some acts or omissions which would otherwise warrant his dismissal.”

22. The Respondent submit that the counterclaim should be allowed as drawn as the Respondent suffered losses as set out in the Counterclaim as a result of the Claimants absenteeism and subsequent resignation.

23. I have examined all the evidence and submissions on record. From the records, the Claimants wrote a joint letter to the Respondents dated 3.9.2014 seeking salary increment but with a rider that they were ready to down their tools if their September salary will not be increased.

24. My understanding of this letter is that the Claimants sought to have their salaries increased but had threatened to down their tools. There is no indication in this letter, the Claimants resigned. The assertion by the Respondents that the Claimants resigned is therefore false.

25. Following this alleged resignation, the Respondent aver that they accepted the resignation. Given this position where there was no resignation but the Respondent assumed there was and accepted it and terminated the Claimants' services, it is my finding that the Claimants were terminated for no valid reason.

26. The Claimants were also terminated without following due process. The termination of the Claimants is therefore unfair and unjustified as envisaged under Section 45(2) of Employment Act 2007 which state as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

27. It is my finding that the Claimants having been terminated on account of a non-existent resignation, were unfairly and unjustly terminated.

28. As for the counter-claim filed by the Respondent, there is no proof that the Claimants were the cause of the variation imposed by the client (UN) upon the Respondent. The Respondent did not call any evidence to prove this fact and I find the counter-claim not justified and I dismiss it accordingly.

29. In terms of remedies, I find for Claimants and I award each one of them as follows:-

1. 2 months' salary in lieu of notice as per the employment contract = 2 x 18,000 = 36,000/=

2. 10 months' salary as compensation for unfair termination = 18,000 x 10 = 180,000/=

3. Unpaid leave for 16 days = 9,600/=

TOTAL = 225,600/=

4. Issuance of Certificate of Service

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 18th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mucheberu for Respondent

Claimants – Absent